value and rental damages and (2) a subsequent hearing on prejudgment interest and other equitable issues.

A jury trial was held from January 18, 2000 through February 17, 2000. The parties' experts presented widely disparate estimates of the measure of plaintiffs' damages. The jury was presented with a Special Verdict Form that asked for a calculation of current fair market value of the subject land and for a year-by-year breakdown of rental damages from 1795 to 1999. The jury was instructed not to adjust rental damages to current day value, as all adjustments would be performed later by the Court. On February 17, 2000, the jury returned a verdict finding current fair market value damages of $35 million and total fair rental value damages of $3.5 million. In awarding the fair rental value damages, the jury awarded the same rental value damages for each year from 1795 to 1999, in the amount of $17,156.86. The jury gave the State a credit for the payments it had made to the Cayugas, of about $1.6 million, leaving the total damages at this stage at approximately $36.9 million.

The hearing on prejudgment interest and other equitable issues was held from July 17, 2000 through August 18, 2000. Eight expert witnesses testified, regarding both the historical context and the assessment of prejudgment interest. Unsurprisingly, the experts reached substantially divergent estimates of the prejudgment interest to which the Cayugas were entitled, ranging from approximately $1.75 billion to zero (this counterintuitive calculation was based on the assumption that the jury verdict needed to be "adjusted"

because the jury had expressed its verdict in "constant 2000 dollars").[3]

On October 2, 2001, the District Court issued a Memorandum-Decision and Order on the interest issue. *Cayuga Indian Nation* v. *Pataki*, 165 F. Supp. 2d 266 (N.D.N.Y. 2001) ("*Cayuga XVI*"). The District Court rejected both the "lowball" figure of the State's expert and the stratospheric figure of the plaintiffs' expert and relied on the estimate of the United States's expert, who had arrived at a figure of $529,377,082. *Id.* at 364. In doing so, the District Court took into account a number of equitable considerations, including "(1) the passage of 204 years; (2) the failure of the U.S. to intervene or to seek to protect the Cayuga's interests prior to 1992; (3) the lack of fraudulent or calculated purposeful intent on the part of the State to deprive the Cayuga of fair compensation for the lands ceded by them in the 1795 and 1807 treaties; and (4) the financial factors enumerated by [the State's expert]." *Id.* at 366. The District Court noted that these financial factors encompassed a number of considerations, including the question whether the Cayugas had access to financial markets or "the ability, knowledge, or skills to take advantage of such markets, especially in the early years," the failure of the verdict to take into account the Cayugas' expenses over the past 204 years, the fact that the unimproved claim area had no rental value until the twentieth century, and the fact that compounding interest over 204 years is at best "a theoretical exercise," because it ignores the history of banking in this country and is extremely unlikely to occur in a real-world mar-

[3] The expert actually testified that the Cayugas owed the State approximately $7.6 million, though the State assured the Court that it would not attempt to collect from the Cayugas.

ket. *Id.* at 364. In light of all these factors, the District Court adjusted downward the interest estimate by 60 percent, resulting in a prejudgment interest award of $211,000,326.80 and a total award of $247,911,999.42. *Id.* at 366. The District Court entered judgment that day.

The District Court addressed various post-judgment motions on March 11, 2002. *Cayuga Indian Nation* v. *Pataki*, 188 F. Supp. 2d 223 (N.D.N.Y. 2002) ("*Cayuga XVII*"). The Court first denied the State's motions for judgment as a matter of law and for a new trial. *Id.* at 247-48. The Court granted the State's motion "to amend the judgment to provide that it runs jointly in favor of the U.S., as trustee, and the tribal plaintiffs," but denied the State's motion "to amend the judgment to run exclusively in favor of the U.S." *Id.* at 257. Finally, the Court denied both parties' motions for recalculation of the prejudgment interest and plaintiffs' motion for reconsideration of the Court's earlier decision rejecting ejectment as a remedy. *Id.*

On June 17, 2002, the District Court granted the parties' motions for permission to appeal and certified for appeal, pursuant to 28 U.S.C. § 1292(b), the issues related to liability and remedies. We granted the District Court's certification of issues for immediate appellate resolution on December 11, 2002.

DISCUSSION

The Supreme Court's recent decision in *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. ——, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005), has dramatically altered the legal landscape against which we consider plaintiffs' claims. *Sherrill* concerned claims by the Oneida Indian Nation, another of the Six Iroquois Nations, that its "acquisition of fee title to discrete

parcels of historic reservation land revived the Oneidas' ancient sovereignty piecemeal over each parcel" and that, consequently, the Tribe need not pay property taxes to the City of Sherrill. *Id.* at 1483. The Supreme Court rejected this claim, concluding that "the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue." *Id.*

We understand *Sherrill* to hold that equitable doctrines, such as laches, acquiescence, and impossibility, can, in appropriate circumstances, be applied to Indian land claims, even when such a claim is legally viable and within the statute of limitations. *See, e.g., id.* at 1494 ("[T]he distance from 1805 to the present day, the Oneidas' long delay in seeking equitable relief against New York or its local units, and developments in the city of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate."). *Sherrill* clarified that the decision does not "disturb" the Supreme Court's holding in *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 229-30, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985) ("*Oneida II*"), which allowed Indian Tribes to seek fair rental value damages for violation of their possessory rights following an ancient dispossession. *See Sherrill*, 125 S. Ct. at 1494 ("In sum, the question of damages for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II*."). Because the Supreme Court in *Oneida II* expressly declined to decide whether laches would apply to such claims, *see Oneida II*, 470 U.S. at 244-45, 253 n.27, 105 S. Ct. 1245, this statement in *Sherrill* is not dispositive of whether laches would apply here.

The Court's characterizations of the Oneidas' attempt to regain sovereignty over their land indicate that what concerned the Court was the disruptive nature of the claim itself. *See id.* at 1483 ("[W]e decline to project redress for the Tribe into the present and future, thereby disrupting the governance of central New York's counties and towns."); *id.* at 1491 ("This long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude [the Tribe] from gaining the disruptive remedy it now seeks."); *id.* at 1491 n.11 ("[The Oneidas'] claim concerns grave, but ancient, wrongs, and the relief available must be commensurate with that historical reality."). Although we recognize that the Supreme Court did not identify a formal standard for assessing when these equitable defenses apply, the broadness of the Supreme Court's statements indicates to us that *Sherrill*'s holding is not narrowly limited to claims identical to that brought by the Oneidas, seeking a revival of sovereignty, but rather, that these equitable defenses apply to "disruptive" Indian land claims more generally.

In their post-*Sherrill* briefs, both the Cayugas and the United States maintain that the *Sherrill* decision "does not affect the award of monetary damages," Cayuga Letter Br. at 1, and "concerned particular equitable remedies" which are not at issue here as "the district court confined its judgment to an award of damages." United States Letter Br. at 6. Our reading of *Sherrill* suggests that these assertions do not present an entirely accurate assessment of its effect on the present case. While the equitable remedy sought in *Sherrill*—a reinstatement of Tribal sovereignty—is not

at issue here, this case involves comparably disruptive claims, and other, comparable remedies *are* in fact at issue.

Despite the eventual award by the District Court of monetary damages, we emphasize that plaintiffs' claim is and has always been one sounding in ejectment; plaintiffs have asserted a continuing right to immediate possession as the basis of all of their claims, and have always sought ejectment of the current landowners as their preferred form of relief. As noted above, in their complaint in this case the Cayugas seek "immediate possession" of the land in question and ejectment of the current residents. Indeed, the District Court noted early in the litigation that it was "clear" that the complaint "presents a possessory claim, basically in ejectment." *Cayuga I*, 565 F.Supp. at 1317 (internal quotation marks omitted).[4] Plaintiffs continue to maintain, on appeal in this Court, that ejectment is their preferred remedy. It was not until 1999, nineteen years after the complaint was filed, and eight years after the District Court's decision on liability, that the District Court determined that the ejectment remedy sought by the Cayugas was, "to put it mildly, . . . not an appropriate remedy in this case." *Cayuga X*, 1999 U.S. Dist. LEXIS 10579, at *97. The District Court thus effectively "monetized" the ejectment remedy in concluding that "monetary damages will produce results which are as satisfactory to the Cayugas as those which they could properly derive from ejectment." *Id.* at *79.

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[4] Plaintiffs took the position in the District Court that monetary damages would not adequately compensate them for two hundred years of wrongful occupation. *See Cayuga VIII*, 1999 U.S. Dist. LEXIS 5228, at *5.

The nature of the claim as a "possessory claim," as characterized by the District Court, underscores our decision to treat this claim like the tribal sovereignty claims in *Sherrill*. Under the *Sherrill* formulation, this type of possessory land claim—seeking possession of a large swath of central New York State and the ejectment of tens of thousands of landowners—is indisputably disruptive. Indeed, this disruptiveness is inherent in the claim itself—which asks this Court to overturn years of settled land ownership—rather than an element of any particular remedy which would flow from the possessory land claim. Accordingly, we conclude that possessory land claims of this type are subject to the equitable considerations discussed in *Sherrill*.

This conclusion is reinforced by the fact that the *Sherrill* opinion does not limit application of these equitable defenses to claims seeking equitable relief. We recognize that ejectment has been characterized as an action at law, as opposed to an action in equity. *See, e.g., New York* v. *White*, 528 F.2d 336, 338 (2d Cir. 1975) (discussing "the legal remedy of ejectment"); *but see Bowen* v. *Massachusetts*, 487 U.S. 879, 893, 108 S. Ct. 2722, 101 L. Ed. 2d 749 (1988) (stating in dicta that "[o]ur cases have long recognized the distinction between an action at law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation —and an equitable action for specific relief—which may include an order providing for . . . ejectment from land . . . ."). Plaintiffs urge us to conclude that, as a legal remedy, ejectment is not subject to equitable defenses, relying, *inter alia*, on the Supreme Court's statement in *Oneida II* that "application of the equitable defense of laches in an action at law would be novel

indeed." *Oneida II*, 470 U.S. at 244 n.16, 105 S. Ct. 1245. In response to this claim, we note *Sherrill*'s statement that "[n]o similar novelty exists when the specific relief [the Tribe] seeks would project redress . . . into the present and future." 125 S. Ct. at 1494 n.14. Whether characterized as an action at law or in equity, any remedy flowing from this possessory land claim, which would call into question title to over 60,000 acres of land in upstate New York, can only be understood as a remedy that would similarly "project redress into the present and future."[5]

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[5] We note that even though ejectment has traditionally been considered an action at law, numerous jurisdictions have recognized the applicability of equitable defenses, including laches, in an action for ejectment based on a claim of legal title or prior possession, regardless of whether damages or an order of possession was sought. *See, e.g.*, *Pankins* v. *Jackson*, 891 S.W.2d 845, 848 (Mo. Ct. App. 1995) (noting that ejectment is claim of legal right of possession, considering whether laches "defeated" "plaintiff's right of possession," and concluding it did not because the delay was not the fault of plaintiff and defendants were not prejudiced); *Jansen* v. *Clayton*, 816 S.W.2d 49, 51-52 (Tenn. Ct. App. 1991) (upholding dismissal of ejectment action because of laches and noting that "[a]lthough ejectment is an action at law, equitable defenses may bar purely legal claims"); *McRorie* v. *Query*, 32 N.C. App. 311, 232 S.E.2d 312, 319 (1977) ("[Plaintiffs] contend that the defense of laches is not applicable here because this is an action in ejectment. They cite no authority for this position, and we find none."); *Miller* v. *Siwicki*, 8 Ill. 2d 362, 134 N.E.2d 321, 323 (1956) (holding laches barred ejectment action brought after 22-year delay and specifying that laches, "even though an equitable defense, can be interposed in an ejectment action."); *Olson* v. *Williams*, 185 Mich. 294, 151 N.W. 1043, 1044-45 (1915) (enjoining pending ejectment action because barred by laches); *Loomis* v. *Rosenthal*, 34 Or. 585, 57 P. 55, 61 (1899) (holding that plaintiffs' "laches [was] so gross as to preclude their recovery of the land.").

One of the few incontestable propositions about this unusually complex and confusing area of law is that doctrines and categorizations applicable in other areas do not translate neatly to these claims. *See, e.g., Oneida II*, 470 U.S. at 240-44, 105 S. Ct. 1245 (holding that the general law favoring the borrowing of state law limitations-periods does not apply to federal Indian land claims); *Mohegan Tribe* v. *Connecticut*, 638 F.2d 612, 614-15 & n.3 (2d Cir. 1980) (holding that adverse possession does not run against Indian land). This proposition was well stated by the District Court:

> As the parties are well aware, the Cayugas are seeking to enforce a "federal common law" right of action for violation of their possessory property rights, as well as seeking to vindicate their rights under the Nonintercourse Act Unfortunately, that Act is silent as to remedies, thus leaving courts to resort to the common law as a means of "assisting . . . in formulating a statutory [Nonintercourse Act] damage remedy." Therefore, in molding a remedy in the present case and in structuring a manageable trial, in the court's opinion it may well be appropriate, and indeed necessary, to fashion a federal common law remedy, which although having some resemblance to remedies available for common law torts such as trespass, is a remedy uniquely tailored to fit the needs of this unparalleled land claim litigation. As the discussion below demonstrates, however, and has been evident for some time as the issue of remedies has come to dominate this litigation, common law principles, whether tort-based or not, are not readily transferrable to this action.

Cayuga XI, 79 F. Supp. 2d at 70-71 (internal citations, quotations, and emphasis omitted). In light of the unusual considerations at play in this area of the law, and our agreement that ordinary common law principles are indeed "not readily transferrable to this action," we see no reason why the equitable principles identified by the Supreme Court in *Sherrill* should not apply to this case, whether or not it could be technically classified as an action at law.

Thus, whatever the state of the law in this area before *Sherrill*, *see Oneida II*, 470 U.S. at 253 n.27, 105 S. Ct. 1245 (reserving "the question whether equitable considerations should limit the relief available" in these cases); *id.* at 244-45, 105 S. Ct. 1245 (deciding not to reach the question of laches because defendants had waived it), we conclude, for the above-stated reasons, that, after *Sherrill*, equitable defenses apply to possessory land claims of this type.

Our reading is not in conflict with the Supreme Court's decision in *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 94 S. Ct. 772, 39 L. Ed. 2d 73 (1974) ("*Oneida I*"), where the Court specifically found federal jurisdiction to hear such possessory claims, including those in ejectment. *Id.* at 666, 94 S. Ct. 772. The Court there noted that "the complaint in this case asserts a present right to possession under federal law. The claim may fail at a later stage for a variety of reasons; but for jurisdictional purposes, this is not a case where the underlying right or obligation arises only under state law and federal law is merely alleged as a barrier to its effectuation." *Id.* at 675, 94 S. Ct. 772. The holding of *Sherrill* thus addresses the question reserved in *Oneida II* and follows from *Oneida I*'s

holding by providing that these possessory claims are subject to equitable defenses.

Inasmuch as the instant claim, a possessory land claim, is subject to the doctrine of laches, we conclude that the present case must be dismissed because the same considerations that doomed the Oneidas' claim in *Sherrill* apply with equal force here. These considerations include the following: "[g]enerations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation," *Sherrill*, 125 S. Ct. at 1483; "at least since the middle years of the 19th century, most of the [Tribe] have resided elsewhere," *id.*; "the longstanding, distinctly non-Indian character of the area and its inhabitants," *id.*; "the distance from 1805 to the present day," *id.* at 1494; "the [Tribe's] long delay in seeking equitable relief against New York or its local units," *id.*; and "developments in [the area] spanning several generations." *Id.*; *see also id.* at 1492-93 ("[T]his Court has recognized the impracticability of returning to Indian control land that generations earlier passed into numerous private hands.") (citing *Yankton Sioux Tribe* v. *United States*, 272 U.S. 351, 357, 47 S. Ct. 142, 71 L. Ed. 294 (1926) ("It is impossible . . . to rescind the cession and restore the Indians to their former rights because the lands have been opened to settlement and large portions of them are now in the possession of innumerable innocent purchasers . . . .")). We thus hold that the doctrine of laches bars the possessory land claim presented by the Cayugas here.[6] The District

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[6] *Sherrill* effectively overruled our Court's holding in *Oneida Indian Nation* v. *New York*, 691 F.2d 1070, 1084 (2d Cir. 1982), that laches and other time-bar defenses should be unavailable and that "suits by tribes should be held timely if such suits would have

Court, after serious consideration of this exact question, explicitly agreed with this assessment. *Cayuga X*, 1999 U.S. Dist. LEXIS 10579, at *86 ("Thus, even though some delay on the part of the Cayugas is explainable, in the context of determining whether ejectment is an appropriate remedy, . . . the delay factor tips decidedly in favor of the defendants.").

To summarize: the import of *Sherrill* is that "disruptive," forward-looking claims, a category exemplified by possessory land claims, are subject to equitable defenses, including laches. Insofar as the Cayugas' claim in the instant case is unquestionably a possessory land claim, it is subject to laches. The District Court found that laches barred the possessory land claim, and the considerations identified by the Supreme Court in *Sherrill* mandate that we affirm the District Court's finding that the possessory land claim is barred by laches. The fact that, nineteen years into the case, at the damages stage, the District Court substituted a monetary remedy for plaintiffs' preferred remedy of ejectment[7] cannot salvage the claim, which was subject to dismissal *ab initio*. To frame this point a different

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been timely if brought by the United States." We note that in a subsequent Oneida case, Judge Newman, while writing for the Court, stated that "[t]he writer accepts the prior panel's rejection of a laches defense as the law of the case, though would find the issue to be a substantial one if it were open." *Oneida Indian Nation* v. *New York*, 860 F.2d 1145, 1149 n.1 (2d Cir. 1988).

[7] After finding for plaintiffs on liability and ruling out ejectment as a remedy, the District Court seems to have folded all of the plaintiffs' requests for relief into its award of damages, without separate consideration of any of the requests for relief. *See Cayuga XI*, 79 F. Supp. 2d at 70. Our conclusion that the award of damages stems entirely from the ejectment claim follows from the District Court's approach.

way: if the Cayugas filed this complaint today, exactly as worded, a District Court would be required to find the claim subject to the defense of laches under *Sherrill* and could dismiss on that basis.

Although we conclude that plaintiffs' ejectment claim is barred by laches, we must also consider whether their other claims, especially their request for trespass damages in the amount of the fair rental value of the land for the entire period of plaintiffs' dispossession, are likewise subject to dismissal. In assessing these claims, we must recognize that the trespass claim, like all of plaintiffs' claims in this action, is predicated entirely upon plaintiffs' possessory land claim, for the simple reason that there can be no trespass unless the Cayugas possessed the land in question. *See, e.g., West 14th Street Commercial Corp.* v. *5 West 14th Owners Corp.*, 815 F.2d 188, 195 (2d Cir. 1987) (holding that a trespass cause of action must allege possession). Inasmuch as plaintiffs' trespass claim is based on a violation of their constructive possession, it follows that plaintiffs' inability to secure relief on their ejectment claim alleging constructive possession forecloses plaintiffs' trespass claim. In other words, because plaintiffs are barred by laches from obtaining an order conferring possession in ejectment, no basis remains for finding such constructive possession or immediate right of possession as could support the damages claimed. Because the trespass claim, like plaintiffs' other requests for relief, depends on the possessory land claim, a claim we have found subject to laches, we dismiss plaintiffs' trespass claim, and plaintiffs' other remaining claims, along with the plaintiffs' action in ejectment.

We recognize that the United States has traditionally not been subject to the defense of laches. *See United*

States v. *Summerlin*, 310 U.S. 414, 416, 60 S. Ct. 1019, 84 L. Ed. 1283 (1940). However, this does not seem to be a *per se* rule. *See, e.g.*, *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 369, 63 S. Ct. 573, 87 L. Ed. 838 (1943) (holding that laches is a defense to the United States in its capacity as holder of commercial paper). Judge Posner has aptly noted that "the availability of laches in at least some government suits is supported by Supreme Court decisions, notably *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 373, 97 S. Ct. 2447, 53 L. Ed. 2d 402 (1977); *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60-61, 104 S. Ct. 2218, 81 L. Ed. 2d 42 (1984); and *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990), that refuse to shut the door completely to the invocation of laches or estoppel (similar doctrines) in government suits." *United States* v. *Administrative Enterprises, Inc.*, 46 F.3d 670, 672-73 (7th Cir. 1995). Indeed, the Seventh Circuit has made clear that, in appropriate circumstances, laches can apply to suits by the federal government. *See NLRB* v. *P*I*E Nationwide, Inc.*, 894 F.2d 887, 894 (7th Cir. 1990) ("Following dictum in *Occidental Life* and the general principle noted earlier that government suits in equity are subject to the principles of equity, laches is generally and we think correctly assumed to be applicable to suits by government agencies as well as by private parties.") (internal citations omitted).

Notwithstanding our conclusion that the United States as plaintiff-intervenor is subject to laches in this case, we do not purport to set forth broad guidelines for when the doctrine might apply. Rather, we follow the Seventh Circuit, which, after canvassing the case law, noted in *Administrative Enterprises* that there are

three main possibilities for when laches might apply against the United States: first, "that only the most egregious instances of laches can be used to abate a government suit"; second, "to confine the doctrine to suits against the government in which . . . there is no statute of limitations"; and third, "to draw a line between government suits in which the government is seeking to enforce either on its own behalf or that of private parties what are in the nature of private rights, and government suits to enforce sovereign rights, and to allow laches as a defense in the former class of cases but not the latter." *Administrative Enterprises*, 46 F.3d at 673 (internal citations omitted). We need not decide which of these three possibilities might govern because this case falls within all three. First, given the relative youth of this country, a suit based on events that occurred two hundred years ago is about as egregious an instance of laches on the part of the United States as can be imagined; second, though there is now a statute of limitations, *see* 28 U.S.C. § 2415(a), there was none until 1966—*i.e.*, until one hundred and fifty years after the cause of action accrued; and third, the United States intervened in this case to vindicate the interest of the Tribe, with whom it has a trust relationship.[8] Accordingly, we conclude that whatever the precise contours of the exception to the rule against subjecting the United States to a laches defense, this case falls within the heartland of the exception.

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[8] Our holding here thus does not disturb our statement in *United States* v. *Angell*, 292 F.3d 333, 338 (2d Cir. 2002), that "laches is not available against the federal government when it undertakes to enforce a public right or protect the public interest," inasmuch as this case does not involve the enforcement of a public right or the protection of the public interest.

We acknowledge that we stated in *Oneida Indian Nation* v. *New York*, 691 F.2d 1070 (2d Cir. 1982), that "[i]t is clearly established that a suit by the United States as trustee on behalf of an Indian tribe is not subject to state delay-based defenses." *Id.* at 1084. That opinion, however, left open the possibility of asserting delay-based defenses founded on federal law in these circumstances. *See id.* (stating that "[t]here remains the question whether a delay-based defense founded on federal law may be asserted" and concluding that because the suit was within the statute of limitations of 28 U.S.C. § 2415, the suit was timely in any case). In light of *Sherrill*, which, as noted above, we read to have substantially altered the legal landscape in this area, we conclude that the federal law of laches can apply against the United States in these particular circumstances.

The Cayugas and the United States highlight the District Court's findings, in deciding whether to award prejudgment interest, that the Cayugas were not "responsible for any delay in bringing this action" and that the "delay was not unreasonable, insofar as the actions of the Cayuga are concerned." Cayuga Letter Br. at 3, United States Letter Br. at 3. We acknowledge these findings, but do not believe they are dispositive for our consideration of the laches question. The equitable considerations relevant to an assessment of a possessory land claim—which is precisely what this case was from the outset—differ dramatically from the equitable considerations in a claim for prejudgment interest, which is what the case had become at the time the District Court made these findings. The District Court itself, as discussed above, found that laches barred the Cayugas' preferred remedy of ejectment.

Indeed, the District Court noted that "[r]egardless of when the Cayugas should have or could have commenced this lawsuit, the court cannot overlook the prejudicial consequences which the defendants would sustain if the court were to order ejectment," and found that the "prejudice factor" was "a factor which is far too important to ignore." *Cayuga X*, 1999 U.S. Dist. LEXIS 10579, at *85-86. In light of these findings, and the Supreme Court's ruling in *Sherrill*, we see no need to remand to the District Court for a determination of the laches question.

Our decision to reverse the judgment of the District Court and enter judgment for defendants should in no way be interpreted as a reflection on the District Court's efforts and rulings in this case. We recognize and applaud the thoughtful and painstaking efforts, over many years, of Judge Neil P. McCurn, who presided over this and related land claims in upstate New York with fairness and due regard to the rights and interests of all parties as well as with a keen appreciation of the complexities of the subject matter and of the relevant law. Our decision is based on a subsequent ruling by the Supreme Court, which could not be anticipated by Judge McCurn in his handling of this case over more than twenty years.

The judgment of the District Court is REVERSED and judgment is entered for defendants.

HALL, District Judge, dissenting in part and concurring in part in the judgment.

While *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. ——, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005), has an impact on this case, it does not compel the conclusion that the plaintiffs are without any remedy for what the District Court found to be the illegal transfer of their land. My understanding of *City of Sherrill* is that it supports the majority's conclusion that the plaintiffs cannot obtain ejectment of those currently in possession of the land which was, over 200 years ago, the Cayuga Nation's Original Reservation. However, based on the nature of the claims long asserted in this case, the elements of the defense of laches, and the language and precedent relied on in *City of Sherrill*, I cannot join the majority in its conclusion that laches bars all of the plaintiffs' remedies, including those for money damages. Therefore, I respectfully dissent in part and concur in part in the judgment.

I. Procedural History

The majority sets forth an excellent summary of the extensive background to this appeal. There are, however, a few procedural aspects that bear noting.

The history of this case makes clear that the Cayuga plaintiffs[1] have, from its filing, asserted multiple causes of action and sought multiple remedies. The complaint states a claim, *inter alia*, for trespass damages. The Cayuga plaintiffs allege that "[a]ll of the defendants are in trespass" and that "[t]he defendants are keeping plaintiffs out of possession of their land in violation of the common law and 25 U.S.C. § 177 (The Non-Inter-

[1] "Cayuga plaintiffs" refers collectively to the Cayuga Indian National and the Seneca-Cayuga Tribe.

course Act)." Cayuga Indian Nation Compl. at ¶ 50. The Cayuga plaintiffs sought several forms of relief, including declaratory relief, ejectment, an accounting, and trespass damages for the fair rental value of the land. It bears noting that the statute of limitations established by Congress did not expire until approximately three years following the date this action was filed. 28 U.S.C. § 2415(a) ("for those claims that are on either of the two lists published pursuant to the Indian Claims Limitations Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim . . ."); 48 Fed. Reg. 13920 (Mar. 31, 1983) (listing Cayuga's "Nonintercourse Act Land Claim"); *see also County of Oneida* v. *Oneida Indian Nation of N.Y.*, 470 U.S. 226, 243, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985) ("*Oneida II*") ("So long as a listed claim is neither acted upon nor formally rejected by the Secretary, it remains live.")

While the majority may be correct that "ejectment is [the plaintiffs'] preferred remedy," Maj. Op. at 274, there is certainly nothing in the record to suggest that the Cayuga plaintiffs relinquished their claims for money damages. *See, e.g., Cayuga Indian Nation* v. *Cuomo*, 565 F. Supp. 1297, 1305-06 (N.D.N.Y. 1983) ("*Cayuga I*") ("With respect to the common law bases for their claim, references are made in plaintiffs' papers to 'ejectment', 'trespass', 'waste' and 'conversion', either as analogous forms of action or as indices of damages."). Indeed, federal common law provides the Cayuga plaintiffs with a variety of remedial theories. "The Supreme Court has recognized a variety of federal common law causes of action to protect Indian lands

from trespass, including actions for ejectment, accounting for profits, and damages." *U.S.* v. *Pend Oreille Pub. Util. Dist. No. 1*, 28 F.3d 1544, 1549 n.8 (9th Cir. 1994), *cert. denied*, 514 U.S. 1015, 115 S. Ct. 1356, 131 L. Ed. 2d 214 (1995). The District Court found that, "the plaintiffs are not specifying a single source for their substantive possessory right, or a single source for their right of action" and read the complaint and the plaintiffs' papers to state a claim "derived from the Nonintercourse Act itself or from federal common law." *Cayuga I*, 565 F. Supp. at 1306. Such a claim has been recognized to include as a remedy a monetary award for damages. *Oneida II*, 470 U.S. at 235-40, 105 S. Ct. 1245. Thus, the plaintiffs here have sought money damages from the filing of this case.

The District Court addressed the application of equitable defenses early in the case, when it considered the non-state defendants' argument "that the equitable remedies of rescission and restitution are no longer available where the use and the value of the land has changed drastically, and where it is held by innocent purchasers."[2] *Cayuga I*, 565 F. Supp. at 1310. The court concluded on the basis of Second Circuit precedent that, while laches did not bar the Cayuga plaintiffs' claims, it may later become relevant with respect to the relief sought. *Id.*

After the District Court held that the 1795 and 1807 land conveyances to New York State were invalid, *Cayuga Indian Nation* v. *Cuomo*, 730 F. Supp. 485, 493

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[2] Notably, at that time, the defendants did not raise the defense of laches, an equitable defense, to any of the plaintiffs' non-equitable claims. *Cayuga I*, 565 F. Supp. at 1310 (discussing application of delay-based defenses to availability of equitable remedies of rescission and restitution).

(N.D.N.Y. 1990) ("*Cayuga III*"), the District Court again faced the question of laches. *Cayuga Indian Nation* v. *Cuomo*, 771 F. Supp. 19, 20 (N.D.N.Y. 1991) ("*Cayuga V*"). However, the District Court again relied on pre-*City of Sherrill* precedent to find that the action had been filed timely and that laches did not apply. *Id.* at 20-24 (citing *Oneida Indian Nation of New York* v. *Oneida County*, 719 F.2d 525, 538 (2d Cir. 1983); *Oneida Indian Nation of New York* v. *New York*, 691 F.2d 1070, 1084 (2d Cir. 1982)).

On November 5, 1992, the United States filed a motion to intervene. It did so both on its own behalf and as trustee to the tribe. In its Answer to the United States' Complaint in Intervention, which, *inter alia*, sought trespass damages, the State alleged that the common law defense of laches barred the claims of and relief sought by the United States. The District Court never reached the question of whether laches could be asserted against the United States in this case because the parties stipulated that the court's previous rejection of the defense as to the other plaintiffs would apply with equal force as to the United States.

Following the District Court's grant of partial summary judgment on the question of liability, the defendants then moved to preclude ejectment as a remedy. The court found "that from the outset ejectment is one of several remedies which the Cayugas have been seeking, and their claims also have been framed in terms of ejectment." *Cayuga Indian Nation* v. *Cuomo*, 1999 U.S. Dist. LEXIS 10579, at *58 (N.D.N.Y. July 1, 1999) ("*Cayuga X*"). Following the reasoning in *United States* v. *Imperial Irrigation District*, 799 F. Supp. 1052 (S.D. Cal. 1992), the District Court treated the ejectment remedy as a request for a permanent injunction.

The court considered the factors iterated by the Restatement (Second) of Torts for application to requests for injunctions against trespass. *Cayuga X*, 1999 U.S. Dist. LEXIS 10579, at *62-63. The District Court did so because, as noted in *Imperial Irrigation*, "an equitable analysis is appropriate before issuing any final orders *other than for monetary damages*." 799 F. Supp. at 1068 (quoted in *Cayuga X*, 1999 U.S. Dist. LEXIS 10579, at *62) (emphasis added).

After considering the interest to be protected, the relative adequacy of various remedies, delay, misconduct, and relative hardship, the interests of third parties, and the practicability of an injunction, *see Restatement (Second) of Torts* § 936(1)(a)-(g), the District Court granted the defendants' motion to preclude ejectment as a remedy.[3] *Cayuga X*, 1999 U.S. Dist. LEXIS 10579, at *99. The court then dismissed those defendants against whom the plaintiffs had sought ejectment and no other remedies. *Id.* Those defendants against whom the plaintiffs had sought other remedies remained in the case. While the majority states that the District Court "monetized" the remedy, Maj. Op. at 275, as I understand the term, it is only partially correct.[4] Instead, it rejected an ejectment remedy based on equitable considerations, including the remedial

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[3] Thus, contrary to the majority's assertion, the District Court did not find "that laches barred the possessory claim," Maj. Op. at 277, but rather concluded that equitable considerations prevented the award of the equitable remedy of possession.

[4] Fair rental value damages, as a monetary remedy, had been sought since the filing of the case.

adequacy of money damages, and allowed the plaintiffs to pursue other remedies.[5]

II. Application of Laches to the Plaintiffs' Claims for Damages

The issue before this court—"the application of a nonstatutory time limitation in an action for damages" —has not been addressed by the Supreme Court. *See City of Sherrill*, 125 S. Ct at 1494 n.14 (citing *Oneida II*, 470 U.S. at 244, 105 S. Ct. 1245[6]. To extend this defense to the Tribe's claim for money damages would be "novel indeed." *Oneida II*, 470 U.S. at 244 n.16, 105 S. Ct. 1245. The majority argues that, "[o]ne of the few incontestable propositions about this unusually complex and confusing area of law is that doctrines and categorizations applicable in other areas do not translate neatly to these claims."[7] Maj. Op. at 276. Such complexity is

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[5] The power of a court sitting in equity to award monetary relief as, or in place of, an equitable remedy has long been recognized. *Cathcart* v. *Robinson*, 30 U.S. 264, 278, 5 Pet. 264, 8 L. Ed. 120 (1831) (Marshall, C.J.); *see also Mora* v. *United States*, 955 F.2d 156, 159-160 (2d Cir. 1992).

[6] Although the *Oneida II* majority did not reach the question, it did observe that "it is far from clear that this [laches] defense is available in suits such as this one [for money damages], ..." *Oneida II*, 470 U.S. at 244, 105 S. Ct. 1245. The Court further noted that "application of the equitable defense of laches in an action at law would be novel indeed." *Id.* at 244 n.16, 105 S. Ct. 1245.

[7] The cases cited by the majority in support of this point, to the extent that they suggest that Indian land claims are to be treated different from non-Indian claims, strongly suggest that Indian claims are entitled to more protection, rather than less, as a result of strong federal policy protecting tribal title from application of state law. *See Oneida II*, 470 U.S. at 240-44, 105 S. Ct. 1245; *Mohegan Tribe* v. *Connecticut*, 638 F.2d 612, 614-15 (2d Cir. 1980).

best addressed by relying on relevant precedent and established principles. Congressional action and centuries of precedent with regard to both Indian land claims and foundational distinctions between rights and remedies, coercive relief and damages, and legal claims and equitable relief, should guide the attempt to resolve this historic dispute.

The plaintiffs here seek relief under two theories, ejectment and trespass. As noted, all claims were brought prior to expiration of the relevant statute of limitations. Historically, both ejectment and trespass are actions at law. Dan B. Dobbs, *Law of Remedies* §§ 5.1, 5.10(1) (2d ed. 1993). Unless a party's delay amounts to either an estoppel or waiver, it does not bar a party's access to remedies at law. *Id.* at § 2.4(4) ("When laches does not amount to estoppel or waiver, it does not ordinarily bar legal claims, only equitable remedies."). Furthermore, laches is not a complete defense to a claim. "Because laches is based on prejudice to the defendant, the bar it raises should be no broader than the prejudice shown." *Id.*

A. Ejectment and Laches

An action for ejectment generally seeks two remedies, restoration of possession and damages equivalent to the fair market rent for the period the plaintiff was wrongfully out of possession, sometimes referred to as *mesne profits*. *Id.* at § 5.10(1). Reinstatement of one's possessory interest in land is typically the most salient of the two remedies. It is hardly surprising, therefore, that some jurisdictions have chosen to make the doctrine of laches available to defendants in ejectment actions where a coercive remedy is sought. *See* Maj. Op. at 275-76 n.5. New York courts have held, for example, that "[a]n equitable defense is good in eject-

ment." *Dixey* v. *Dixey*, 196 A.D. 352, 354, 187 N.Y.S. 879 (2d Dep't 1921) (citing *Phillips* v. *Gorham*, 17 N.Y. 270 (1858)).

The defense of laches pertains only to the remedy sought, not the cause of action itself. The elements of laches are both delay and prejudice. *City of Sherrill*, 125 S. Ct. at 1491 ("laches, a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims for equitable relief"); *Kansas* v. *Colorado*, 514 U.S. 673, 687, 115 S. Ct. 1733, 131 L. Ed. 2d 759 (1995) ("The defense of laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." (internal quotations omitted)); *Penn Mut. Life Ins. Co.* v. *City of Austin*, 168 U.S. 685, 698, 18 S. Ct. 223, 42 L. Ed. 626 (1898) ("The reason upon which the rule [of laches] is based is not alone the lapse of time during which the neglect to enforce the right has existed, but the changes of condition which may have arisen during the period in which there has been neglect."); *see also* Fred F. Lawrence, *A Treatise on the Substantive Law of Equity Jurisprudence*, § 1037 (1929) ("Being, like all other equitable relief, purely protective, it is not to be inferred from delay alone, but rather from the consequences which may under the circumstances flow from it."). The nature of the remedy sought will necessarily change the court's analysis of the effect of delay. "[E]quity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done, in the particular case, by granting the relief asked." *Abraham* v. *Ordway*, 158 U.S. 416, 420, 15 S. Ct. 894, 39 L. Ed. 1036 (1895) (emphasis added). "[L]aches is not, like limitation, a

mere matter of time; but principally a question of the inequity of permitting the claim to be enforced." *Gallihher* v. *Cadwell*, 145 U.S. 368, 373, 12 S. Ct. 873, 36 L. Ed. 738 (1892). Thus, the application of the equitable defense of laches is, by its nature and function, confined by the particular prejudice caused by the remedy.

However, where a plaintiff seeks ejectment damages, rather than restoration of a possession interest, application of the doctrine of laches to such a money damage claim is rarely if ever justified. Even where reinstatement of possession is disruptive, attendant damage claims are not similarly disruptive. It is axiomatic that a menu of remedies, some mutually exclusive, may be associated with the same right and that, in different factual situations, different remedies will be appropriate. Here, the plaintiffs' claims for possession and for fair rental value damages should be treated separately. While the element of delay found in connection with application of the defense to the possession remedy is equally present with regard to the money damages remedy, there is no corresponding prejudice to the defendant New York State ("State") in connection with an award of money damages. The bar of laches does not rise high enough to bar the money judgment here. *See* Dobbs, *supra*, § 2.4(4).

Determining that the coercive remedy of restoration of possession is barred by laches requires a fact-intensive inquiry regarding the disruptiveness of that remedy. In *City of Sherrill*, for example, the Court found that the defendants in that case had "justifiable expectations" which were "grounded in two centuries of New York's exercise of regulatory jurisdiction." 125 S. Ct. at 1490-91. The Supreme Court held that the remedy sought by the Oneida Indian Nation—the reasser-

tion of sovereignty resulting in "a checkerboard of state and tribal jurisdiction"—was disruptive to justifiable expectations regarding the state, and therefore local, regulatory authority over territory. *Id.* at 1482. The *City of Sherrill* Court concluded, in the face of two hundred years of sovereign control by the State of New York and its municipalities, that the reassertion of tribal sovereignty would be "disruptive." *Id.* at 1491.

City of Sherrill would thus support a finding that restoration of possession, following two hundred years of unlawful possession, is a sufficiently disruptive remedy that it may satisfy the prejudice element of the laches defense. However, the proof involved with the remedy of damages will be radically different than that involved with a claim for an injunction, specific performance, or equitable re-possession in real property. Indeed, there does not appear to be anything in the money damages award in this case that would be disruptive.

The majority concludes that the plaintiffs' "possessory land claims" are barred in their entirety by *City of Sherrill* and reasons that the plaintiffs, having been denied the right to possession, cannot prove the elements of their claims for money damages. However, current possession is not an element of a legal claim for ejectment. A legal claim for ejectment consists of the following elements: "[p]laintiffs are out of possession; the defendants are in possession, allegedly wrongfully; and the plaintiffs claim damages because of the allegedly wrongful possession." *Oneida Indian Nation of N.Y.* v. *County of Oneida, N.Y.*, 414 U.S. 661, 683, 94 S. Ct. 772, 39 L. Ed. 2d 73 (1974) ("*Oneida I*") (citing *Taylor* v. *Anderson*, 234 U.S. 74, 34 S. Ct. 724, 58 L. Ed. 1218 (1914)). Making out this claim cannot depend on

the plaintiffs' ability to obtain the right to *future* possession, whether legal or constructive, as such requirement would make the claim circular. Instead, the only necessary element in this regard is that the plaintiffs are wrongfully out of possession, which element the District Court here found. *Cayuga III*, 730 F. Supp. at 493. The inability to obtain the coercive remedy of possession, as a result of the court's exercise of discretion in the same case, should not bar an ejectment claim for money damages.

B. Trespass

While the majority does not appear to apply the laches defense to a claim for trespass damages, it nevertheless dismisses the plaintiffs' trespass claim on the basis that it is derivative of the ejectment claim and requires proof of possession. The fact that "possession" is an element of a claim for trespass does not require dismissal of the action, however. The trespass claim is not predicated upon the plaintiffs' possessory claim, nor is there any relationship between the two claims that necessitates dismissal of the trespass claim. Indeed, the plaintiffs may be able to prove the right to possession[8] while being unable to obtain a coercive remedy that would restore them in the future to physical possession.

The majority's contention that the plaintiffs cannot make out their claim for damages because their claim for coercive relief fails treats the special defense of laches as if it were in the nature of a statute of repose. However, nowhere in *City of Sherrill* is the "right" of

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[8] There are issues on appeal concerning the rulings by the District Court that the plaintiffs have a right to possession because the land transfers were illegal.

possession addressed; the Court writes always about the "remedy" of possession. *See, e.g., City of Sherrill*, 125 S. Ct. at 1489. Courts have discretion to apply laches to deny a party some or all remedies. *See supra* at 283-84. However, the defense of laches does not apply to prevent a party from establishing an element of its cause of action. *See Felix* v. *Patrick*, 145 U.S. 317, 325, 12 S. Ct. 862, 36 L. Ed. 719 (1892) (discussed in *City of Sherrill*, 125 S. Ct. at 1491-92). Perhaps if laches were a doctrine akin to a statute of repose, such that, first, it applied to a legal claim and, second, it vitiated the claim, the majority's analysis that claims involving the right to possess are barred by laches because laches bars the remedy of possession might be persuasive. *See generally P. Stolz Family P'ship* v. *Daum*, 355 F.3d 92, 102 (2d Cir. 2004) (discussing difference between statutes of repose, which define and limit rights, and statutes of limitations, which "bear on available remedies"). Nothing in the case law concerning laches, however, supports such an analysis.

C. United States as Plaintiff

The United States is a plaintiff in this case. "The principle that the United States are not . . . barred by any laches of their officers, however gross, in a suit brought by them as a sovereign Government to enforce a public right, or to assert a public interest, is established past all controversy or doubt." *United States* v. *Beebe*, 127 U.S. 338, 344, 8 S. Ct. 1083, 32 L. Ed. 121 (1888) (quoted in *Alaska Dep't of Envtl. Conservation* v. *EPA*., 540 U.S. 461, 514, 124 S. Ct. 983, 157 L. Ed. 2d 967 (2004) (Kennedy, J., dissenting)); *see also United States* v. *Summerlin*, 310 U.S. 414, 416, 60 S. Ct. 1019, 84 L. Ed. 1283 (1940). In the instant case, the United States pursues a right created by a federal statute and

proceeds in its sovereign capacity and, as such, is not subject to a laches defense. *Summerlin*, 310 U.S. at 417, 60 S. Ct. 1019; *c.f.*, *United States* v. *California*, 507 U.S. 746, 757-58, 113 S. Ct. 1784, 123 L. Ed. 2d 528 (1993). That the United States acts both on its own behalf as well as that of the Cayugas does not affect this principle for "it is also settled that state statutes of limitation neither bind nor have any application to the United States, when suing to enforce a public right or to protect interests of its Indian wards." *United States* v. *Minnesota*, 270 U.S. 181, 196, 46 S. Ct. 298, 70 L. Ed. 539 (1926); *see also Nevada* v. *United States*, 463 U.S. 110, 141-42, 103 S. Ct. 2906, 77 L. Ed. 2d 509 (1983); *Board of County Comm'rs of Jackson County* v. *United States*, 308 U.S. 343, 350-51, 60 S. Ct. 285, 84 L. Ed. 313 (1939).

The majority explains its application of the defense of laches to claims asserted by the United States by suggesting that the doctrine that the United States is not subject to the defense of laches "does not seem to be a *per se*" rule. *See* Maj. Op. at 278. For this point, it relies upon *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 63 S. Ct. 573, 87 L. Ed. 838 (1943). However, that case is distinguishable from the instant one in two important respects, both of which exclude this case from the limited holding reached in *Clearfield Trust*.

First, the Court in *Clearfield Trust* limited its application of non-statutory time bars to those claims brought by the United States that were not subject to any statutory time bar. *Id.* at 367, 63 S. Ct. 573 ("In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards."). The claims in this case are subject to a statutory time bar. *See* 28 U.S.C.

§ 2415; *see also supra* at 280-81. As Congress has already defined the applicable time bar, *Clearfield Trust* supports the conclusion that this court should not reach the question of whether it ought to fashion a time-bar, whether from state law or federal common law. *See id.* at 367, 63 S. Ct. 573; *see also Northwest Airlines, Inc.* v. *Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 95, 101 S. Ct. 1571, 67 L. Ed. 2d 750 (1981) ("the federal lawmaking power is vested in the legislative, not the judicial, branch of government; therefore federal common law is 'subject to the paramount authority of Congress.") *New Jersey* v. *New York*, 283 U.S. 336, 348, 51 S. Ct. 478, 75 L. Ed. 1104 (1931)"; *Westnau Land Corp.* v. *United States Small Bus. Admin.*, 1 F.3d 112, 117 (2d Cir. 1993) ("[T]he acknowledged federal interest in the 'rights of the United States arising under nationwide federal programs,' *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979), should be determined by application of the statutory rule provided by Congress.").

Second, the *Clearfield Trust* Court limited the application of laches to those claims deriving not from the sovereign authority and rights of the United States but, instead, relating to the actions of the United States with respect to business and commerce. *Clearfield Trust*, 318 U.S. at 369, 63 S. Ct. 573 ("The United States as drawee of commercial paper stands in no different light than any other drawee."); *see also Franconia Assocs.* v. *United States*, 536 U.S. 129, 141, 122 S. Ct. 1993, 153 L. Ed. 2d 132 (2002) (citing *Clearfield Trust* for the proposition that "[o]nce the United States waives its immunity and does business with its citizens, it does so much as a party never cloaked with immu-

nity."); *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United States*, 530 U.S. 604, 607, 120 S. Ct. 2423, 147 L. Ed. 2d 528 (2000) ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." (internal quotation marks omitted)). In the instant case, the United States is not a commercial actor. Here, it acts both "to enforce a public right [and] to protect interests of its Indian wards." *United States* v. *Minnesota*, 270 U.S. at 196, 46 S. Ct. 298. It is clear, then, that the United States's claims in this case, both on its own behalf and as trustee to the Tribe, are not barred by laches.

After relying on *Clearfield Trust* to open the door for application of laches to claims by the United States, the majority then finds that the defense is appropriate in the instant case. In doing so, it relies on a Seventh Circuit case for the proposition that three Supreme Court cases support the application of laches in cases such as this one. *United States* v. *Admin. Enters., Inc.*, 46 F.3d 670, 673 (7th Cir. 1995) (citing *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 373, 97 S. Ct. 2447, 53 L. Ed. 2d 402 (1977); *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60-61, 104 S. Ct. 2218, 81 L. Ed. 2d 42 (1984); *Irwin* v. *Dep't of Veterans Affairs*, 498 U.S. 89, 95-96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990)).

However, neither *Administrative Enterprises*, nor the cases cited therein, support the application of laches to the United States in the instant case. Of the three cases cited by *Administrative Enterprises*, only one specifically addresses the applicability of a delay-based defense like laches in a suit brought by the United

States.[9] *Occidental Life*, 432 U.S. at 373, 97 S. Ct. 2447. The *Occidental Life* Court declined to allow delay to bar a claim by the United States. *Id.* To the extent that it "refuse[d] to shut the door completely to the invocation of laches or estoppel," *Administrative Enterprises, Inc.*, 46 F.3d at 673, it did so, in dicta, only where a "private plaintiff's unexcused conduct of a particular case" made limitations on *relief*, specifically backpay, appropriate. *Occidental Life*, 432 U.S. at 373, 97 S. Ct. 2447. *Occidental Life*, thus, differentiates between claims and remedies, and unexcused delay by private plaintiffs and the United States. *Id.* It does not support application of laches here, where the majority applies the defense to bar the claim itself, rather than a specific remedy for the claim.[10]

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[9] *Heckler* concerns estoppel, not laches, but does confirm as "well settled" precedent that "the Government may not be estopped on the same terms as any other litigant." 467 U.S. at 60, 104 S. Ct. 2218. *Irwin* addresses equitable tolling and concludes that the statute of limitations on a private party's claim against the United Statutes may be equitably tolled where the statutory waiver of sovereign immunity allowing for the private right action also makes the rule of equitable tolling applicable to the United States. 498 U.S. at 95-96, 111 S. Ct. 453. Notably, the Court commented that "Congress, of course, may provide otherwise if it wishes to do so." *Id.* at 96, 111 S. Ct. 453.

[10] Another case, *NLRB* v. *P*I*E Nationwide, Inc.*, is relied on by the majority for the proposition that "laches is generally and we think correctly assumed to be applicable to suits by government agencies . . . ." Maj. Op. at 278 (quoting 894 F.2d 887, 894 (7th Cir. 1990)). That case, however, limits the court's equitable discretion to areas where neither Congress nor a federal agency has made a "value choice" contrary to the exercise of equitable discretion of the court. *P*I*E Nationwide, Inc.*, 894 F.2d at 894 ("[W]e do not mean to suggest that the court is entitled to substitute its conception . . . for that of Congress . . .").

These cases cannot support the proposition that this Court has the authority to craft a federal common law defense of laches against an Indian land claim sought by the United States. Indeed, *Administrative Enterprises* "three main possibilities for when laches might apply against the United States," Maj. Op. at 279, are not present in this case. With regard to *Administrative Enterprises'* first "possibility," egregious delay, while two hundred years is surely a significant length of time, the majority fails to consider the nature of that delay and to what extent it may be excused. With regard to *Administrative Enterprises'* second "possibility," the absence of an applicable statute of limitations, here Congress did enact a statute of limitations applicable to the plaintiffs' claims for damages. 28 U.S.C. § 2415(a).[11] With regard to *Administrative Enterprises'* third "possibility," situations where the United States pursues a "private" interest, the Supreme Court has found that, insofar as it acts on behalf of Indian tribes, the United States acts to protect a public interest, entirely dissimilar from the private interest served where the United States pursues an action based on its purely commercial endeavors. *See United States* v. *Minnesota*, 270 U.S. 181, 196, 46 S. Ct. 298, 70 L. Ed. 539 (1926) (describing United States' role in serving public interest by protecting "interests of its Indian wards."). Indeed, it is in its role as a sovereign that the United States participates in this case. *Id.* at 194, 46 S. Ct. 298 (United

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Congress has spoken on the issue of time bars to Indian land claims. While distinguishing between remedies may be appropriate, barring those claims entirely ignores the controlling statute.

[11] That § 2415(a) applies only to actions for money damages supports the conclusion that laches cannot be applied to bar a claim for money damages, but may be applied to bar a claim for equitable relief.

States' interest in suit in which it represents Indians' interests as trustee is based in its own sovereignty.). Thus, even if *Administrative Enterprises* were persuasive precedent, this case presents none of its suggested possible situations justifying use of laches against the United States.

III. The Import of *City of Sherrill*

The majority sees "no reason why the equitable principles identified by the Supreme Court in *City of Sherrill* should not apply to this case, whether or not it could be technically classified as an action at law." Maj. Op. at 276. However, the clear language of *City of Sherrill* confines its holding to the use of laches to bar certain relief, not to bar a claim or all remedies:

> "The question whether equitable consideration should limit the *relief* available to the present day Oneida Indians . . . ." *City of Sherrill*, 125 S. Ct. at 1487 (quoting *Oneida II*, 470 U.S. at 253, n.27, 105 S. Ct. 1245) (emphasis added).
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> "In contrast to *Oneida I* and *II*, which involved demands for monetary compensation, OIN sought equitable *relief* prohibiting, currently and in the future, the imposition of property taxes." *Id.* at 1488 (emphasis added).
>
> "When the Oneidas came before this Court 20 years ago in *Oneida II*, they sought money damages only. The court reserved for another day the question whether 'equitable considerations' should limit the *relief* available to the present-day Oneidas." *Id.* at 1489 (internal citations omitted) (emphasis added).

> "The principle that the passage of time can preclude *relief* has deep roots in our law. . . . It is well-established that laches, a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims for *equitable relief*." *Id.* at 1491 (emphasis added).
>
> ". . . the Oneida's long delay in seeking equitable *relief* . . . evokes the doctrine[] of laches . . ." *Id.* at 1494.

The *City of Sherrill* opinion is not support for the application of the equitable defense of laches as a bar to money damages in this case.[12]

The *City of Sherrill* Court's analysis, which underpins its holding, is framed by the nature of the equitable remedy that the Oneida Indian Nation sought there. *See* 125 S. Ct at 1488 ("OIN sought equitable relief"); *id.* at 1489 ("OIN seeks declaratory and injunctive relief"); *id.* at 1491 ("This long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and [evidence of prejudice] . . . preclude OIN from gaining the disruptive remedy it now seeks."); *id.* at 1494 ("long delay in seeking equitable relief"); *id.* at 1494 n.14 ("specific relief"). This language makes clear that the *City of Sherrill* Court addresses laches in the context of the specific equitable relief sought in that case. Further, it repeatedly notes the difference between a right and a remedy. As the *City of Sherrill* Court notes, the question of right is "very different" from the

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[12] It is also telling that Justice Stevens noted in dissent that the majority "relie[d] heavily on the fact that the Tribe is seeking *equitable relief* in the form of an injunction." *Id.* at 1496 (Stevens, J., dissenting) (emphasis in the original and added).

question of remedy. *Id.* at 1489 (quoting Dan B. Dobbs, *Law of Remedies* § 1.2 (1st ed. 1973)). The *City of Sherrill* Court also quotes with approval a Tenth Circuit case for the principle that "the distinction between a claim or substantive right and a remedy is fundamental." *Id.* at 1489 (quoting *Navajo Tribe of Indians* v. *New Mexico*, 809 F.2d 1455, 1467 (10th Cir. 1987)). As if to emphasize this point, and its importance to the opinion, the *City of Sherrill* Court also quotes, with approval, the district court in *Oneida Indian Nation of New York* v. *County of Oneida* on this distinction between right and remedy. "[There is a] 'sharp distinction between the *existence* of a federal common law right to Indian homelands,' a right this Court recognized in *Oneida II*, 'and how to *vindicate* that right.'" *City of Sherrill*, 125 S. Ct. at 1488 (quoting *Oneida Indian Nation of N.Y.* v. *County of Oneida*, 199 F.R.D. 61, 90 (N.D.N.Y. 2000) (emphasis in original)).

Further, the Supreme Court in *City of Sherrill* addresses at length an Indian land claim case, *Felix* v. *Patrick*, 145 U.S. 317, 12 S. Ct. 862, 36 L. Ed. 719 (1892). 125 S. Ct. at 1491-92. While the *Felix* Court applied laches to bar the equitable remedy of a constructive trust over land conveyed by the plaintiff's Indian ancestor in violation of a statutory restriction, the Court noted, in *dicta*, that a money damages award would be appropriate. *Felix*, 145 U.S. at 334, 12 S. Ct. 862. While the law demanded a measure of money damages, the delay and prejudice due to changed circumstances over thirty years supported the application of the doctrine of laches to the equitable remedy of constructive trust. *Id.* at 333-34, 12 S. Ct. 862; *see City of Sherrill*, 125 S. Ct. at 1491-92.

Finally, the *City of Sherrill* Court expressly noted that, "the question of damages for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II*." 125 S. Ct. at 1494. While this statement is not dispositive of whether laches would apply here to bar a money damage award, the Court in *City of Sherrill* did reiterate its observation in *Oneida II* that "application of a nonstatutory time limitation in an action for damages would be 'novel.'" *Id.* at 1494 n.14. (quoting *Oneida II*, 470 U.S. at 244, 105 S. Ct. 1245). In contrast, it noted that "no similar novelty exists when the specific *relief* OIN now seeks would project redress for the Tribe into the present and future." *Id.* (emphasis added). In light of the clear language and the analysis in *City of Sherrill*, the conclusion that *City of Sherrill* limits the application of the equitable defense of laches to the award of forward-looking, disruptive equitable relief is compelling.[13]

Further, even assuming laches could apply to the money damages award in this case, there is nothing in the record before us to support a finding of the disruptive nature of the monetary award. The *City of Sherrill* decision certainly supports affirming the District Court's denial of repossession as an equitable remedy, based on the District Court's findings that the equitable considerations involved in the case did not permit it. *See Cayuga X*, 1999 U.S. Dist. LEXIS 10579, at *74-

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[13] The contention that a damages award for either past fair rental value or present fair market value would "project redress into the present and future," Maj. Op. at 275, in order to bring that award within the scope of the *City of Sherrill* holding vitiates any reasonable meaning the Supreme Court could have intended that phrase to have.

*99.[14] However, there is no basis to support such a finding on the prejudice element with regard to the award of money damages as a remedy in this case.

IV. Conclusion

While *City of Sherrill* may have "dramatically altered the legal landscape" of Indian land claims, Maj. Op. at 273, it does not reach as far as the majority reads it. *City of Sherrill* holds that laches can bar a tribe from obtaining the disruptive remedy of re-assertion of tribal sovereignty. Furthermore, the case supports the proposition that the nature of forward-looking, disruptive remedies generally will serve as equitable considerations that can bar such equitable remedies as repossession, even against the United States. An award of money damages is not an equitable remedy, nor is it forward-looking or disruptive in the way dispossession inherently is. Nothing in *City of Sherrill* suggests a total bar on the ability of Indian tribes to obtain damages for past wrongs where Congress has explicitly provided for it.

City of Sherrill serves as strong support to affirm the District Court's refusal to award possession to the

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[14] The District Court did not conclude, as the majority suggests, that the "doctrine of laches bars the possessory land claim presented by the Cayugas here." Maj. Op. at 277. Indeed, the District Court concluded, on then-existing precedent, that laches did not bar the plaintiff's claims, *Cayuga I*, 565 F. Supp. at 1310, but it later concluded that equitable considerations did prevent the award of the equitable remedy of possession. *Cayuga X*, 1999 U.S. Dist. LEXIS 10579, at *98. Properly distinguishing between claims and remedies, the District Court concluded that, "in the context of determining whether ejectment is an appropriate remedy, the delay factor tips decidedly in favor of the defendants." *Id.* at *86.

plaintiffs, and I join in the judgment to that extent. However, I respectfully dissent from that part of the majority opinion which dismisses the Tribe's claim for money damages. While there remain issues as to the nature or amount of the money damages awarded, I cannot join the majority in reading *City of Sherrill* to bar all remedies.

While I do not join entirely in the majority's resolution of this case, I wholeheartedly concur in its comments concerning Judge McCurn's tireless and thoughtful attention to this complex and challenging case for over two decades.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

80-CV-930, 80-CV-960

THE CAYUGA INDIAN NATION OF NEW YORK, ET AL., PLAINTIFFS

AND

THE SENECA-CAYUG TRIBE OF OKLAHOMA, PLAINTIFFS-INTERVENOR

AND

UNITED STATES OF AMERICA, PLAINTIFF-INTERVENOR

v.

GEORGE P. PATAKI, ET AL., DEFENDANTS

[Filed: June 17, 2002]

NEAL P. MCCURN, Sr. U.S. District Judge

ORDER

On June 13, 2002, the court heard oral argument with respect to the following motions:

(1) A "request" by the Seneca-Cayuga Tribe of Oklahoma ("the Tribe"), in which the Cayuga Indian Nation of New York (collectively referred to as the "tribal plaintiffs") joined, made pursuant to Fed. R. Civ. P. 60(a) to "correct" the court's March 19, 2002 Amended Judgment to "insert the phrase 'as trustee' following the reference to the United States;[1]

[1] *See* Feldman Letter to Court (4/9/02) at 1.

(2) A "request" by the State of New York ("the State") to amend the March 19, 2002 Amended Judgment to "add the phrase *'for all successors-in-interest of the historic Cayuga Indian Nation,*" after the words 'as trustee.'" Zwickel Letter to Court (5/10/02) at 1 (emphasis in original);

(3) By defendants Seneca and Cayuga Counties "for an [o]rder pursuant to Fed. R. Civ. P. 54(b) further amending the March 19, 2002 Amended Judgment to reflect that there is 'no just reason for delay' of the Counties' appeal from the liability rulings against the Counties; or, in the alternative, for an Order pursuant [to] 28 U.S.C. § 1292(b) certifying for interlocutory appeal the liability issues determined by the Court in favor of the plaintiffs and plaintiff-intervenors as against the Counties." Notice of Motion and Motion at 1-2;[2] and

(4) Conditional Cross-Motion by the tribal plaintiffs "that in the event the Court grants certification of any order pursuant to 28 U.S.C. § 1292(b) at the request of . . . [any non-State defendant], and in that event only, the[y] . . . will cross-move . . . for an order, pursuant to 28 U.S.C. § 1292(b), granting certification for interlocutory appeal of this Court's July 1, 1999

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[2] "Defendant Miller Brewing Company, individually and on behalf of the defendant class of landowners in this action" expressly joins in the counties' motion to amend or to certify the liability issues for an interlocutory appeal, "and adopts the statements and arguments made in the affidavit and memorandum of law filed therewith." Response of the Defendant Class to the Counties' Motion to Further Amend the Amended Judgment or to Certify the Liability Issues for Interlocutory Appeal at 1. Likewise, the State of New York had no opposition to these motions by the Counties. *See* Roberts Letter to Court (4/29/02) at 1.

decision and order denying the remedy of ejectment against any such non-State defendants whose request for interlocutory appeal has been granted[.]" Notice of Conditional Cross-Motion at 1-2.

After reviewing all of the memoranda of law and letters submitted in support of and in opposition to the foregoing, and after hearing the argument of counsel, the court hereby:

(1) GRANTS the "request" of the tribal plaintiffs to amend the March 19, 2002 Amended Judgment pursuant to Fed. R. Civ. P. 60(a) to add the word "as Trustee" following the United States of America; but

(2) DENIES the State's "request" to add the successor-in-interest language;

(3) DENIES the Counties' motion to amend the judgment pursuant to Fed. R. Civ. P. 54(b); but GRANTS their motion to amend the judgment pursuant to 28 U.S.C. § 1292(b) to certify for interlocutory appeal the liability issues determined by the Court in favor of the plaintiffs and plaintiff-intervenors as against the Counties; and

(4) GRANTS pursuant to 28 U.S.C. § 1292(b) the tribal plaintiffs' conditional cross-motion for certification of this court's July 1, 1999 decision and order deny ejectment as a remedy in this case.

IT IS SO ORDERED.

DATED: June 17, 2002
SYRACUSE, NY

/s/ NEAL P. MCCURN
NEAL P. MCCURN
Sr. U.S. District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

80-CV-930 (Lead)
& 80-CV-960

THE CAYUGA INDIAN NATION OF NEW YORK, ET AL., PLAINTIFFS

AND

THE SENECA-CAYUGA TRIBE OF OKLAHOMA AND THE UNITED STATES OF AMERICA, PLAINTIFF-INTERVENORS

v.

GEORGE E. PATAKI, AS GOVERNOR OF THE STATE OF NEW YORK, ET AL., DEFENDANTS

[Filed: June 17, 2002]

SECOND AMENDED JUDGMENT IN A CIVIL CASE

[X] Jury Verdict. This action came before the Court for a trial by jury in Phase I. The issues have been tried and the jury has rendered its verdict on February 17, 2000.

[X] Decision by Court. This action came to trial or hearing before the Court in Phase II. The issues have been tried or heard and a decision has been rendered on October 2, 2001.

IT IS ORDERED AND ADJUDGED, that pursuant to Fed. R. Civ. P. 54(b), the court hereby certifies the judgment reflected above as final.

In addition, this matter was before the court on June 13, 2002, for further amendments to this judgment and in accordance with oral rulings made by the court that day, and the Order entered by this court on June 17, 2002, in conformity therewith;

IT IS FURTHER ORDERED AND ADJUDGED, that judgment be entered jointly in favor of the plaintiff, The Cayuga Indian Nation of New York and the plaintiff-intervenors, The Seneca-Cayuga Tribe of Oklahoma and the United States of America, as Trustee, against the State of New York in the amount of $36,911,671.62, pursuant to the jury verdict of February 17, 2000, together with prejudgment interest awarded on October 2, 2001, in the amount of $211,000,326.80, for a total award of $247,911,999.42;

IT IS FURTHER ORDERED AND ADJUDGED, that the County defendants' motion, which the State of New York, as well as the defendant Miller Brewing Company and the defendant class of landowners joined in, made pursuant to 28 U.S.C. § 1292(b) is hereby granted and the court hereby certifies for interlocutory appeal the following rulings previously issued by this court:

1. Denial of defendants' motion to dismiss for lack of subject matter jurisdiction based on "statute of limitations, equitable defenses, geographic non-applicability of the Nonintercourse Act, no private right of action, and abatement of statutory claims." *Cayuga Indian Nation of New York* v. *Cuomo*, 565 F. Supp. 1297 (N.D.N.Y. 1983);

2. Denial of defendants' motion to dismiss on the basis that plaintiffs' claims are not justiciable. *Id.*;

3. Denial of defendants' motion for summary judgment that plaintiffs are not an "Indian tribe" within the meaning of the Nonintercourse Act. *Cayuga Indian Nation of New York* v. *Cuomo*, 667 F. Supp. 938 (N.D.N.Y. 1987);

4. Denial of defendants' motion for summary judgment that plaintiffs are barred from pursuing a Nonintercouse Act claim by the doctrine of election of remedies. *Id.*;

5. Denial of defendants' motion for summary judgment that the court lacks subject matter jurisdiction because the Indian Claims Commission provided the exclusive forum to resolve disputes regarding the validity of the disputed conveyances. *Id.*;

6. Denial of defendants' motion for summary judgment that the issue of federal ratification was decided by the Indian Claims Commission, thereby precluding the plaintiffs from bringing this action. *Id.*;

7. Denial of defendants' motion for summary judgment that the creation of the Indian Claims Commission by Congress was tantamount to explicit ratification of the 1795 and 1807 Treaties. *Id.*

8. Grant of partial summary judgment to plaintiffs that the two conveyances of land in 1795 and 1807 were never properly ratified by the federal government as required by the Nonintercourse Act, notwithstanding the relevant historical correspondence and payments made to the Cayuga pursuant to the 1926 Arbitration Tribunal award. *Cayuga Indian Nation of New York* v. *Cuomo*, 730 F. Supp. 485 (N.D.N.Y. 1990);

9. Denial of defendants' motion for summary judgment that the defense of abandonment is available to defeat plaintiffs' claims, and the grant of plaintiffs' motion for summary judgment on the same issue. *Cayuga Indian Nation of New York* v. *Cuomo*, 758 F. Supp. 1907 (N.D.N.Y. 1991);

10. Grant of plaintiffs' motion for a declaration that any and all defenses fo the defendants, including the affirmative defense of laches, are insufficient to avoid liability on plaintiffs' claims, resulting in partial summary judgment to plaintiffs on the issue of liability as to all defendants except New York State, *Cayuga Indian Nation of New York* v. *Cuomo*, 771 F. Supp. 19 (N.D.N.Y. 1991); and

IT IS FURTHER ORDERED AND ADJUDGED, that the Tribal plaintiffs' conditional cross-motion for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is hereby granted with respect to this court's July 1, 1999, decision and order denying the remedy of ejectment in this case.

Entered: June 17, 2002 LAWRENCE K. BAERMAN
CLERK

/s/ illegible signature
(BY)
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

Nos. 80-CV-930, 80-CV-960

THE CAYUGA INDIAN NATION OF NEW YORK, ET AL., PLAINTIFFS

AND

THE SENECA-CAYUGA TRIBE OF OKLAHOMA AND THE UNITED STATES OF AMERICA, PLAINTIFF-INTERVENORS

v.

GEORGE E. PATAKI, AS GOVERNOR OF THE STATE OF NEW YORK, ET AL., DEFENDANTS

Mar. 11, 2002

MEMORANDUM-DECISION AND ORDER

MCCURN, Senior District Judge.

The court assumes familiarity with this protracted land claim litigation, spanning more than two decades, based upon transactions occurring over two hundred years ago, and generating no less than 17 written decisions. Following two separate trials, on October 2, 2001, the court entered judgment in this case in the amount of $247,911,999.42, representing the jury's February 17, 2000, damage award of $36,911,672.62, and

the court's subsequent prejudgment interest award of $211,000,326.80.

Not unexpectedly, entry of this judgment resulted in a flurry of motion activity. On October 17, 2001, three sets of motions were filed: (1) post-judgment motions setting forth six different grounds for relief on behalf of the State itself, as well as on behalf of the various State agencies and individual agency heads named in the original complaints ("the State");[1] (2) motions by the Cayuga Indian Nation of New York and the Seneca-Cayuga Tribe of Oklahoma ("the tribal plaintiffs") to amend the judgment and a "conditional motion" for a new trial; and (3) the non-State defendants'[2] motion to amend the judgment. Several days later, on October 22, 2001, the plaintiff-intervenor the United States of America ("U.S.") filed a motion seeking to dismiss all defendants except the State from its complaint in intervention.

For analytical purposes, these motions can be broadly divided into two categories—those pertaining to amendment of the judgment and those seeking a new trial. In the former group are: (1) the non-State defendants' motion to amend the judgment pursuant to Fed. R. Civ. P. 52(b) and 59(e), making it final as against all

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[1] *See Cayuga Indian Nation of New York* v. *Cuomo*, Nos. 80-CV-930, 80-CV-960, 1999 WL 509442, at *3-*4 (N.D.N.Y. July 1, 1999) (construing plaintiffs' respective complaints broadly, court read original complaints as including the State itself as a defendant, even though various State agencies and individual agency heads were named as defendants therein, but not the State itself).

[2] The non-State defendants consist of Miller Brewing Company, individually and as representative of the defendant class of approximately 7,000 landowners, as well as Seneca and Cayuga Counties.

parties; (2) the tribal plaintiffs' motion to amend the judgment allowing an immediate appeal of same in accordance with Fed. R. Civ. P. 54(b); and (3) the U.S.' motion to dismiss the non-State defendants from its complaint in intervention. As will be seen, although not identical, these three motions are closely related and hence the court will analyze them together; it will then separately analyze the remaining motions.

I. *Amendment of Judgment*

Background

The two motions to amend the judgment and the U.S.' motion to dismiss must be viewed in the larger context of this decades-old litigation, and particularly this court's decision in *Cayuga Indian Nation of New York* v. *Pataki*, 79 F.Supp.2d 66 (N.D.N.Y. 1999) ("*Cayuga XI*"). Partially to avoid the unfathomable task of "conducting separate jury trials with respect to the approximately 7,000 private individual landowners, as well as the [other] non-State defendants[,]" among other things, in *Cayuga XI* this court granted the U.S.' motion "to first proceed to trial against the State[.]" *Id.* at 74. "[T]he only direct opposition" to that motion was from the State "which argue[d] . . . that separate trials would be inefficient given that it intends to offer basically the same proof at any and all trials conducted in connection with this action." *Id.* at 76. The court gave little credence to that opposition argument explaining, "[t]he only possibility of a substantial overlap in proof is remote indeed, . . . given the repeated assurances by both the State and federal governments that if the court grants this motion for a separate trial, that will end this litigation." *Id.*

Then the court went on to enumerate the various assurances made by the U.S., the State and the tribal plaintiffs that once a judgment was entered against the State, those parties would *not* be pursuing further claims against the non-State defendants. *See id.* at 76-77. Given those assurances, the court found that "the likelihood of future subsequent trials seem[ed] all but moot[.]" *Id.* at 77. The court concluded by "stress[ing] that the non-State defendants, which by court order are not participating in this upcoming trial, *are not bound in any way*, such as through the application of collateral estoppel or res judicata, *by any determinations made in the State's damage trial.*" *Id.* at 77-78 (emphasis added). It is against this procedural backdrop which the court is considering the present motions to amend the judgment in this case, as well as the U.S.' motion to dismiss.

Discussion

A. Rule 52(b)

Among other things, Rule 52(b) provides that "[o]n a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly." Fed. R. Civ. P. 52(b). In accordance with this Rule, the non-State defendants are moving to amend the October 2, 2001 judgment so it is final as against *all* parties, even though the State was the only defendant participating in Phases I and II. *See* Affidavit of William Dorr (Oct. 16, 2001) ("Dorr Aff.") at 2, ¶ 2; *id.* at 4, ¶ 16 (emphasis added); *see also* Non-State Defendants' Notice of Motion at 1-2.

Offering two distinct bases for this motion, the non-State defendants first assert that the judgment should

be amended to indicate that it is final as against all parties because otherwise there is a possible Seventh Amendment violation. Anticipating that despite prior assurances to the contrary, including those made in connection with the U.S.' motion for a separate trial, the plaintiffs will attempt to recover against the non-State defendants in subsequent trials, the non-State defendants are raising the possibility of inconsistent verdicts and hence a violation of the Seventh Amendment's guarantee to a jury trial. More specifically, the non-State defendants reason that in the event of future trials, their Seventh Amendment rights would be violated because a second jury would be reexamining facts and issues previously decided by the jury in Phase I, a proceeding in which those defendants did not participate.

As another reason for amending the judgment herein, the non-State defendants are relying upon the doctrine of judicial estoppel. In general, judicial estoppel "'prevents a party from asserting a factual position in a legal proceeding that is contrary to a position previously taken by [the party] in a prior legal proceeding.'" *Bridgeway Corp.* v. *Citibank*, 201 F.3d 134, 141 (2d Cir. 2000) (quoting *Bates* v. *Long Island R.R.*, 997 F.2d 1028, 1037 (2d Cir. 1993)). Because in *Cayuga XI* the tribal plaintiffs, the U.S. and the State vouched that after completing litigation against the State, those parties would *not be pursuing* further trials against the non-State defendants, *see Cayuga XI*, 79 F. Supp. 2d at 77, the non-State defendants contend that "the tribal plaintiffs and the [U.S.] should be judicially estopped from seeking further trials against th[os]e . . . defendants[;]" and based upon that estoppel, the court should amend the judgment to indicate that it is final as

against all parties. *See* Memorandum of Law in Support of the Non-State Defendants' Motion to Amend the Judgment at 7. The non-State defendants are seeking this amendment "so that the judgment is final and the parties may proceed with an appeal of all issues they deem appropriate." Dorr Aff. at 2, ¶ 4. Alternatively, these defendants are "request[ing] that [the court] issue a scheduling order for motions for summary judgment on the issue of damages against the non-State defendants." *Id.* at 7, ¶ 26.

The State does not oppose this Rule 52(b) motion to amend. But if the court grants such relief, as the State observes, plainly there would be "no need for separate Rule 54(b) certification[,]" such as the tribal plaintiffs are seeking. *See* State Defendants' Memorandum of Law in Opposition to the Cayuga Plaintiffs' Motion to Amend the Judgment ("St. Oppn. Memo.") at 1, n.1; and Letter from David Roberts to Court of 11/19/01 ("Roberts Ltr") at 1.

The tribal plaintiffs, on the other hand, do oppose the non-State defendants' motion to amend, reasoning that there is no possible Seventh Amendment violation because this court previously ordered separate trials as opposed to bifurcation. Implicit in this argument is the notion that because any subsequent trials would be wholly separate, there would be no danger of a different jury trying factual issues which were previously decided by the jury in Phase I. Furthermore, the tribal plaintiffs contend that the Seventh Amendment is not implicated here, and thus cannot provide a basis for amending the judgment making it final as against all parties, because in *Cayuga XI* this court explicitly held that the non-State defendants would not be bound "in any way . . . by any determinations made in the

State's damage trial." *See Cayuga XI*, 79 F. Supp. 2d at 77-78.

The tribal plaintiffs respond that the non-State defendants' judicial estoppel argument is similarly unavailing. In particular, the tribal plaintiffs assert that judicial estoppel does not apply here because the remarks upon which the non-State defendants are relying in this regard are "unsworn precatory remarks of counsel in different stages of the same proceeding[.]" Cayugas' Memorandum of Law in Opposition to Defendants' Post-Judgment Motions ("Cay. Oppn. Memo.") at 9. At a minimum, the tribal plaintiffs contend that this Rule 52(b) motion to amend is "premature[.]" *Id.* at 12.

The U.S. does not directly respond to the non-State defendants' Rule 52(b) motion to amend. The U.S. reasons, however, that its motion to dismiss all of the defendants except the State from its complaint in intervention renders moot "the non-State Defendants' concern that the [U.S.] would seek further trials or remedies from them[.]" *See* Plaintiff-Intervener United States' Response to Defendants' Post-Judgment Motions ("U.S. Resp.") at 34. The U.S. is overlooking the fact though that unless the court grants the non-State defendants' Rule 52(b) motion to amend the judgment, because the tribal plaintiffs are not making a similar dismissal motion, the non-State defendants would remain defendants in this action at least with respect to the tribal plaintiffs' complaints. In any event, consistent with the representations it made in connection with its motion for a separate trial against only the State as a defendants, the U.S. once again asserts that it will *not* be "pursu[*ing*] *any further trials or remedies against*" the non-State defendants. *See id.* at 34-35 (emphasis added).

The non-State defendants retort that "it appears that the parties to this lawsuit *all concur* that the judgment should be amended to reflect that it is final and that no further trials should be held to award damages against the non-State defendants." Affidavit in Response to the Tribal Plaintiffs' Conditional Post Trial Motion and in Further Support of the Non-State Defendants' Motion to Amend the Judgment (Nov. 15, 2001) at 1-2, ¶ 2 (emphasis added). Clearly the non-State defendants have selectively reviewed the post-trial submissions because, as the preceding outline of the same reveals, the parties do *not* all agree that the court should amend the judgment in accordance with Rule 52(b). Accordingly, it is necessary for the court to more closely analyze the propriety of granting the non-State defendants' Rule 52(b) motion.

1. *Seventh Amendment*

The Seventh Amendment, which protects the right to a jury trial, reads as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII. This "Reexamination Clause does not limit or alter trial judges' historically broad discretion to sever issues for trial[,]" *Simon* v. *Philip Morris Incorporated*, 200 F.R.D. 21, 34 (E.D.N.Y. 2001); but it does prohibit a given issue from being tried by different, successive juries. *See In re Visa Check/ Mastermoney Antitrust Litigation*, No. 00-7699, 2001 WL 1242717, at *29 n.9 (2d Cir. Oct. 17, 2001) (citing

Blyden v. *Mancusi*, 186 F.3d 252, 268 (2d Cir. 1999)). Thus, for example, in *Blyden* the Second Circuit found a Seventh Amendment violation where "both the liability . . . and the damages juries were asked to determine whether the same acts constituted 'reprisals,'" thus "creat[ing] the real possibility—amounting to a probability—that acts found to be 'reprisals' by the liability jury were different from the acts found to be 'reprisals' by the damages juries." *Blyden*, 186 F.3d at 268 and 269. By engaging in "sound case management," however, such as "carefully defin[ing] the roles" of the "successive juries," and "carefully craft[ing] the verdict form[s][,]" it is possible for courts to avoid running afoul of the Seventh Amendment. *See Robinson* v. *Metro-North Commuter R.R. Co.*, 267 F.3d 147, 169 n.13 (2d Cir. 2001), *pet. for cert. filed*, 70 USLW 3429 (Dec. 17, 2001) (No. 01-908).

In contrast to *Blyden*, at least at this juncture, there has been no showing of an actual Seventh Amendment violation in the present case. In fact, in the court's opinion the non-State defendants' claim of a Seventh Amendment violation is purely conjecture given the pledges catalogued by this court in *Cayuga XI* that the tribal plaintiffs, the U.S. and the State would *not* be pursuing further remedies against the non-State defendants. *See Cayuga XI*, 79 F. Supp. 2d at 76-77. What is more, in the extremely unlikely event of subsequent trials against the non-State defendants, a violation of the Seventh Amendment would not necessarily follow because, as mentioned above, in *Cayuga XI* this court expressly held that the non-State defendants would not be bound in any way by determinations made in the State's trial. *See id.* at 77-78. Therefore, even if the practically inconceivable occurs, and there are subse-

quent trials against the non-State defendants, those defendants would not be bound by Phases I and II wherein the State was the only participating defendant.

Finally, despite the Seventh Amendment's guarantee to a jury trial, the court retains "substantial discretion to employ appropriate mechanisms of jury control[.]" *See Simon*, 200 F.R.D. at 33. Thus even if, as the State suggested in *Cayuga XI*, there is a substantial overlap in evidence between Phases I and II and any subsequent proceedings, it does not necessarily follow that a violation of the non-State defendants' Seventh Amendment rights would result. That is so because it would be possible to structure any subsequent trials in such a way so as to avoid violating the non-State defendants' right to a jury trial. *See Houseman* v. *U.S. Aviation Underwriters*, 171 F.3d 1117, 1127 (7th Cir. 1999) (citation omitted). In light of the foregoing, the non-State defendants' anticipatory constitutional breach does not justify amending the judgment to make it final as against all parties.

2. *Judicial Estoppel*

The non-State defendants' reliance upon judicial estoppel as a basis for amending the judgment herein is similarly misplaced. Positing that "[t]he tribal plaintiffs and [U.S.] should be judicially estopped from seeking further trials because they pledged to the Court that a single trial against the State would end" this litigation, the non-State defendants reason that "permit[ting] plaintiffs to backpedal now would seriously undermine the Court's decision to allow for a separate trial." Dorr Aff. at 6, ¶ 23. The court disagrees, and for the reasons set forth below declines to apply the "rare remedy" of judicial estoppel as a means of amending the judgment this case. *See In re Bradlees Stores, Inc.*, No. 00-16033,

2001 WL 1112308, at *10 (S.D.N.Y. Sept. 20, 2001) (citation omitted); *see also In re Venture Mortgage Fund, L.P.*, 245 B.R. 460, 472 (Bankr. S.D.N.Y. 2000) (internal quotation marks and citation omitted) (emphasis added) (Judicial estoppel "is a rarely used doctrine designed 'to protect the court, *not a party*, from a party's chicanery.'").

"Although [the Supreme Court] ha[s] not had occasion to discuss [judicial estoppel] elaborately," it long ago explained that doctrine as follows:

> [W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

New Hampshire v. *Maine*, 532 U.S. 742, 748-49, 121 S. Ct. 1808, 1814, 149 L. Ed. 2d 968 (2001) (quoting *Davis* v. *Wakelee*, 156 U.S. 680, 689, 15 S. Ct. 555, 39 L. Ed. 578 (1895)). In contrast to equitable estoppel, "which is designed 'to ensure fairness in the relationship between parties[,]'" judicial estoppel is "a means to 'preserve the sanctity of the oath' or to 'protect judicial integrity by avoiding the risk of inconsistent results in two proceedings.'" *Simon* v. *Safelite Glass Corp.*, 128 F.3d 68, 71 (2d Cir. 1997) (quoting *Bates*, 997 F.2d at 1037-38) (other citation omitted). "Because the rule is intended to prevent improper use of judicial machinery, . . . , judicial estoppel is an equitable doctrine invoked by a court at its discretion[.]" *New Hampshire*, 532 U.S. at 750-51, 121 S. Ct. at 1815 (internal quotation marks and citations omitted).

In *New Hampshire* v. *Maine*, the Supreme Court acknowledged that "the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle[.]" *Id.* (citations omitted). Despite that, the Court went on to identify "several factors [which] typically inform the decision whether to apply the doctrine in a particular case[.]" *Id.* "First, a party's later position must be *clearly* inconsistent with its earlier position." *Id.* (internal quotation marks and citations omitted) (emphasis added). "Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled[.]" *Id.* (internal quotation marks and citations omitted). The third factor identified by the Supreme Court "is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* (citations omitted).

Before examining whether the non-State defendants are entitled to rely upon judicial estoppel, it should be noted that in *New Hampshire* the Supreme Court stressed that by "enumerating th[o]se factors, [it] [was] *not* establish [ing] inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel." *Id.* (emphasis added). Indeed, the Supreme Court, like the Second Circuit, has noted that a court's inquiry in assessing the applicability of judicial estoppel in a given case is inherently fact specific. *See id.*; *see also See United States* v. *West Productions, Ltd.*, 168 F. Supp. 2d 84, 88 (S.D.N.Y. 2001). Thus, in terms of the

first element, the Second Circuit has instructed courts to look not only at the nature of the prior position, but also whether that position was taken in a "*prior* proceeding." *See West Productions*, 168 F. Supp. 2d at 87 (citing *Bates*, 997 F.2d at 1037) (emphasis added).

In assessing the first component of judicial estoppel, the court will assume for the sake of argument that the tribal plaintiffs, the U.S., or both are taking an inconsistent position with respect to the issue of future trials against the non-State defendants (*i.e.* they *will be* pursuing such trials despite contrary assurances made in connection with the U.S.' earlier motion for a separate trial against the State alone). Even giving the non-State defendants the benefit of that assumption, the court finds that those defendants are not entitled to rely upon judicial estoppel to amend the judgment because the plaintiffs did not take an inconsistent position in a *prior* proceeding. Significantly, "[t]he Second Circuit has *never* held that judicial estoppel can apply to inconsistent positions in the *same proceeding*[.]" *Tuff-N-Rumble Management* v. *Sugarhill Music Pub.*, 99 F. Supp. 2d 450, 457 (S.D.N.Y. 2000) (citations omitted) (emphasis added). "There are good reasons for not extending [judicial estoppel] to cover inconsistencies in the same proceeding[,]" as Judge Sweet soundly reasoned, "including the tensions between judicial estoppel and the liberal pleading standards of the Federal Rules, which permits alternative and inconsistent defenses, and the fact that the ultimate purpose of judicial estoppel, to prevent abuse of the courts by litigants, is easier to control when inconsistent facts are asserted in the same proceeding." *Id.*; *see also United States Fidelity & Guaranty Co.* v. *Petroleo Brasileiro S.A.*, No. 98 CIV 3099, 2001 WL 300735, at *10 (S.D.N.Y.

March 27, 2001) (internal quotation marks and citations omitted) ("Circumspection in the use of judicial estoppel is warranted because of a concern for offending the liberal spirit of the federal pleading rules, and, in particular because of its tension with the alternative pleading provisions of Fed. R. Civ. P. 8(e)(2)."). In the present case, because the purportedly inconsistent statements were made earlier in this same proceeding and not in a prior, separate legal proceeding, the court agrees with the tribal plaintiffs that the non-State defendants have fallen short in satisfying the first judicial estoppel element.

Furthermore, "[b]ecause judicial estoppel is invoked to protect the integrity of the judicial process from the threat of inconsistent results, there must be a *true inconsistency* between the statements in the *two proceedings*. If the statements can be reconciled there is no occasion to apply an estoppel." *Simon*, 128 F.3d at 72-73 (citing, *inter alia*, *AXA Marine & Aviation Ins. (UK) Lt.* v. *Seajet Indus. Inc.*, 84 F.3d 622, 628 (2d Cir. 1996)) (emphasis added). Although they recognize that a prior inconsistent statement is a prerequisite to applying judicial estoppel, the non-State defendants have not made any attempt to show such an inconsistency. The non-State defendants' focus upon what they deem to be the "unequivocal" nature of the tribal plaintiffs' and the U.S.' earlier statements, *i.e.* granting the U.S.' motion for a separate trial would mean "no further trials against the non-State defendants[.]" *See* Non-St. Def. Supp. Memo. at 8-9 (footnote omitted). The non-State defendants are missing the point however. It is not the unequivocal nature of the prior statement which is significant; rather it is the inconsistency of the

subsequent statement which is determinative for judicial estoppel purposes.

Here, with respect to the plaintiff-intervenor U.S., there is no "clear inconsistency" in terms of its position regarding the non-State defendants. In fact if anything, the U.S.' position is even stronger than it was in 1999 when it argued for a separate trial against the State as the sole defendant. At that time, the U.S. declared that "the case would end right there[]" if it obtained a judgment against the State, and "[t]here is no need for the[] 7,000 individual[] [landowners] to ever go to court." *See Cayuga XI*, 79 F. Supp. 2d at 76 (internal quotation marks and citations omitted). Now, the U.S. is backing up those earlier statements with actions. As will be discussed more fully below, after reviewing the New York land claims, including the present one, "[t]he Departments of Justice and the Interior . . . concur with the view of the prior Administration that it is the policy of the [U.S.] *not* to seek relief from parties in the New York land claims that acquired lands from the State or subsequent landowners in good faith." United States' Motion to Dismiss all Defendants from United States' Complaint Excepting New York State at 5 (emphasis added). "[T]o implement this policy[,]" the U.S. is now seeking to "*delet[e]* from . . . [its] complaint *all claims and remedies against all parties* other than New York State." *Id.* (emphasis added). In light of the foregoing, the non-State defendants are extremely hard-pressed to show a "clear inconsistency" between the U.S.' prior litigation strategy with respect to the non-State defendants and the position which it is advancing as part of these post-judgment motions.

It is true that in contrast to the U.S., the tribal plaintiffs are not yet moving for dismissal of the non-State

defendants from this action. The court is unwilling to find a "true inconsistency," however, between the tribal plaintiffs' earlier assertion that "as a practical matter if there is one trial against the State that will be it[,]" and their relative silence now on that issue. *See Cayuga XI*, 79 F. Supp. 2d at 77 (internal quotation marks and citations omitted). Indeed, the tribal plaintiffs' willingness to seek Rule 54(b) certification of an immediate appeal, in this court's view, conforms to its position several years ago in this litigation that a trial against the State alone would for all intents and purposes end this lawsuit. Thus far, the tribal plaintiffs have not affirmatively indicated that they intend to change horses in mid-stream and aggressively pursue claims against the non-State defendants. Therefore, as with the U.S., the court is unable to find a "clear inconsistency" in terms of the tribal plaintiffs' position regarding pursuing further trials against the non-State defendants.

In the absence of prior inconsistent statements in an earlier proceeding, none of the policies underlying judicial estoppel are thwarted in this case. This is not a situation where "plaintiffs have tried to obtain an advantage over their adversaries by litigating on one theory, and then seek[ing] an inconsistent advantage by pursuing an incompatible theory." *Motrade* v. *Rizkozaan, Inc.*, No. 95 Civ. 6545(DC), 1998 WL 108013, at *6 (S.D.N.Y. March 11, 1998) (internal quotation marks and citation omitted). In fact, as just mentioned and as will be discussed more fully below, the U.S. is holding steadfast to the position it took in 1999 when it moved for a separate trial against the State; it will not be seeking any relief against the non-State defendants in this action. To be sure, at least at this point the tribal plaintiffs are not following the U.S.' lead by making a

similar motion to dismiss, but the current circumstances are a far cry from "a party [which] has 'sold' its position to one court[,]" and [which] is now "'turn[ing] around and repudiat[ing] it in order to have a second victory.'" *See Motrade*, 1998 WL 108013, at *6 (quoting *AXA Marine*, 84 F.3d at 628) (other citation and quotation omitted). Moreover, because the Second Circuit has "limit[ed] the doctrine of judicial estoppel to situations where the *risk of inconsistent results* with its impact on judicial integrity is *certain*[,]" *see Simon*, 128 F.3d at 72 (citing *Bates*, 997 F.2d at 1038) (emphasis added), and because such certainty is lacking here, there is no reason for the court to invoke this "rare remedy."

At the end of the day, the non-State defendants have failed to convince this court that it should exercise its discretion and apply the doctrine of judicial estoppel to amend the judgment. The non-State defendants have not met their burden of showing that any of the plaintiffs made a "truly inconsistent[]" statement; that is one which "necessarily precludes the truth of the other," *see Hotel Syracuse, Inc.* v. *City of Syracuse Industrial Development Agency*, 155 B.R. 824, 837 (Bankr. N.D.N.Y. 1993) (citations omitted), much less that such a statement was made in a *prior*, "*separate* legal proceeding[][.]" *See Kunica* v. *St. Jean Financial, Inc.*, 233 B.R. 46, 58 (S.D.N.Y. 1999) (citations omitted) (emphasis added). Accordingly, there is no need for the court to address the remaining judicial estoppel factors. What is more, the non-State defendants' inability to meet their burden of proof in this regard precludes granting their Rule 52(b) motion to amend the judgment based upon a finding of judicial estoppel. *See Bonnie & Co. Fashions, Inc.* v. *Bankers Trust Co.*, 18

F. Supp. 2d 297, 301 (S.D.N.Y. 1998) (citation omitted) (denying defendant's motion for judicial estoppel where defendant could not meet its burden of establishing the second element).

To conclude, given the tenuous nature of both the non-State defendants' Seventh Amendment and judicial estoppel arguments, the court denies without prejudice their motion to amend the judgment, to make it final as against all parties. As will be seen, however, the denial of this motion does not mean that an immediate appeal cannot be had in this case; but the scope of that appeal will not be as broad as the non-State defendants are advocating on this Rule 52(b) motion.

B. Rule 54(b) Certification

Like the non-State defendants, the tribal plaintiffs are moving to amend the judgment but they are relying upon a different federal rule. Instead of granting the non-State defendants' motion to amend the judgment making it final as against all parties under Rule 52(b), the tribal plaintiffs maintain, as Fed. R. Civ. P. 54(b) allows, that the court should certify for immediate appeal the October 2, 2001 judgment wherein the State is the only named defendant. Given the court's denial of the non- State defendants' motion to amend the judgment, this motion for certification becomes all the more significant.

"When [a] district court has resolved at least one but fewer than all of the claims in an action, Rule 54(b) permits the court to direct the entry of a final judgment '*only* upon an express determination that there is no just reason for delay.'" *L.B. Foster Co.* v. *America Piles, Inc.*, 138 F.3d 81, 86 (2d Cir. 1998) (quoting Fed. R. Civ. P. 54(b)) (emphasis added). Therefore, as Rule

54(b) "makes clear . . . if the District Court does not *both* direct entry of judgment *and* expressly determine that there is no just reason for delay, then its order or decision is not final, whether or not it is labeled a 'judgment.'" *HBE Leasing Corp.* v. *Frank*, 48 F.3d 623, 631 (2d Cir. 1995) (footnote omitted). Following issuance of this court's decision in *Cayuga Indian Nation of New York* v. *Pataki*, 165 F. Supp. 2d 266 (N.D.N.Y. 2001) ("*Cayuga XVI*"), the Clerk of the Court entered judgment in accordance therewith, but that judgment did not include a "no just reason for delay" determination because at that time none of the parties were seeking entry of a final judgment under Rule 54(b). Thus, despite the State's assertion to the contrary, *see* Memorandum of Law in Support of State Defendants' Post-Judgment Motions ("St. Supp. Memo.") at 34, the absence of language allowing for immediate appeal of the October 2nd judgment was intentional. Now, however, the issue of whether the court should certify that judgment for immediate appeal is squarely before the court on the tribal plaintiffs' current motion made pursuant to Rule 54(b).

A district court has discretion to enter a final judgment in accordance with the plain language of Rule 54(b), but "the exercise of [same] *must* follow the procedures set out [therein.]" *HBE Leasing*, 48 F.3d at 631 (emphasis added). More specifically, in exercising its discretion under that Rule, "'(1) multiple claims *or* multiple parties must be present, (2) at least one claim, or the rights or liabilities of at least one party, must be fully decided within the meaning of 28 U.S.C. § 1291, *and* (3) the district court must make an express determination that there is no just reason for delay and expressly direct the clerk to enter judgment.'" *Ishihara*

Chemical Co., Ltd., No. 99 MISC. 232(FB), 2000 WL 1898484, at *1 (E.D.N.Y. Dec. 19, 2000) (quoting *Ginett* v. *Computer Task Group, Inc.*, 962 F.2d 1085, 1091 (2d Cir. 1992)) (emphasis added). Although "[t]he Second Circuit has cautioned against the overuse of Rule 54(b) certification," at the same time it "has also . . . sanctioned the use of [such] certification 'where there are interest[s] of sound judicial administration and efficiency to be served.'" *See Bristol Technology, Inc.* v. *Microsoft Corp.*, 127 F. Supp. 2d 85, 90 (D. Conn. 2000) (quoting *Hogan* v. *Consol. Rail Corp.*, 961 F.2d 1021, 1025 (2d Cir. 1992)) (other citations and internal quotations marks omitted).

Strict adherence to Rule 54(b)'s requirements for certification of an immediate appeal arises out of "[r]espect for the 'historic federal policy against piecemeal appeals[.]'" *See L.B. Foster*, 138 F.3d at 86 (quoting *Curtiss-Wright Corp.* v. *General Electric Co.*, 446 U.S. 1, 8, 100 S. Ct. 1460, 1465, 64 L. Ed. 2d 1 (1980)) (quoting in turn *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 438, 76 S. Ct. 895, 901, 100 L. Ed. 1297 (1956)). This "policy promotes judicial efficiency, expedites the ultimate termination of an action and relieves appellate courts of the need to repeatedly familiarize themselves with the facts of a case." *Oklahoma Turnpike Authority* v. *Bruner*, 259 F.3d 1236, 1241 (10th Cir. 2001). Accordingly, the Supreme Court has consistently admonished that certification under Rule 54(b) should "*not* be granted routinely." *L.B. Foster*, 138 F.3d at 86 (citing *Curtiss-Wright*, 446 U.S. at 8, 100 S. Ct. at 1465) (other citation omitted) (emphasis added). Taking a similar view, on more than one occasion the Second Circuit has recognized that a court's power under Rule 54 "'should be used only in the infrequent harsh case' where there

exists 'some danger of hardship or injustice through delay which would be alleviated by immediate appeal.'" *Id.* (quoting, *inter alia*, *Brunswick Corp.* v. *Sheridan*, 582 F.2d 175, 183 (2d Cir. 1978)) (other citations omitted). By the same token though, Rule 54(b) "attempts to strike a balance between the undesirability of more than one appeal in a single action and the need for making review available in a multiple-party or multiple-claim situations at a time that best serves the needs of the litigants.'" *See Oklahoma Turnpike Authority*, 259 F.3d at 1241 (quoting 10 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 2654 at 35 (1982)).

Keeping in mind the policies underlying Rule 54(b), the court will turn to the tribal plaintiffs' motion made thereunder.[3] In the present case, all three criteria for certification under Fed. R. Civ. P. 54(b) are met. As to the first element, not only are there multiple claims, but as should be patently obvious by now, there are also multiple parties. Among other things, in *Cayuga XI*, in

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[3] Before examining each of the Rule 54(b) criteria, the court is compelled to comment upon the fact that despite the stringent requirements outlined above for certification under that Rule, the tribal plaintiffs have provided only the most conclusory reasons for granting such relief. The tribal plaintiffs did not even bother to address the first two criteria for Rule 54(b) certification. And as to the third criteria, without providing either a factual or legal basis, they baldly assert that "[t]he posture of this case, . . . , fully meets the requirements for the express determination that there is no just reason for delay and for direction for the entry of judgment." *See* Memorandum of Law in Support of Motion to Amend Judgment at 4 (citations omitted). Despite those deficiencies both the State and the U.S. agree, albeit for different reasons, that as Fed. R. Civ. P. 54(b) allows, the court should grant the tribal plaintiffs' motion for immediate appeal of the October 2, 2001 judgment.

denying the U.S.' motion for a finding of joint and several liability, the court reasoned that the tribal plaintiffs had sustained a divisible injury. *See Cayuga XI*, 79 F. Supp. 2d at 72. Furthermore, the court found that the relationship among the defendants was akin to that of multiple tortfeasors, where "their wrongs are independent and successive [,]" but where "the State could be deemed an original or primary tortfeasor[]" due to its initial violation of the Nonintercourse Act. *Id.* at 73 (internal quotation marks and citation omitted) and 74. Indeed, in granting the U.S.' motion for a separate trial as against the State, the court effectively severed plaintiffs' claims against the non-State defendants from those of the State. Thus, because there are both multiple claims *and* multiple parties, the first element for certification under Rule 54(b) is satisfied in this case.

Turning to the "fully decided" or finality aspect of Rule 54(b) certification, it is well settled that "[t]o be considered 'final,' an order must be 'final' in the sense that it is 'an ultimate disposition of an *individual claim* entered in the course of a multiple claims action.'" *Oklahoma Turnpike Authority*, 259 F.3d at 1242 (quoting *Curtiss-Wright Corp.*, 446 U.S. at 7, 100 S. Ct. at 1464) (quoting in turn *Sears, Roebuck & Co.*, 351 U.S. at 436, 76 S. Ct. at 900) (emphasis added). "While the exact definition of 'claim' for purposes of Rule 54(b) is unsettled, . . . , a 'claim' is generally understood to include all factually or legally connected elements of a case." *Id.* (and cases cited therein). One commentator has explained this "notion of connectedness" as follows:

> [A] judgment is not final unless the claims disposed of are separable from the remaining claims against the same parties. Separability is an elusive term,

> and no reliable litmus test exists for determining when a claim is a distinct claim of relief. Courts, however, have concentrated on two factors: (1) the factual overlap (or lack thereof) between the claims disposed of and the remaining claims, and (2) whether the claims disposed of and the remaining claims seek separate relief.

Id. at 1242-43 (quoting *Moore's Federal Practice 3d* § 202.06[2]) (citing *Curtiss-Wright Corp.*, 446 U.S. at 8, 100 S. Ct. at 1464-65) (district court should "consider such factors as whether the claims under review were separable from the others remaining to be adjudicated"). "Thus, a judgment is not final for the purposes of Rule 54(b) unless the claims resolved are distinct and separable from the claims left unresolved." *Id.* at 1243.

As previously discussed, in the context of the U.S.' motions for a finding of joint and several liability and for a separate trial, this court implicitly found that plaintiffs' claims against the State were "distinct and separable" from their claims against the non-State defendants. *See Cayuga XI*, 79 F. Supp. 2d at 74. Furthermore, after the court's prejudgment interest award in *Cayuga XVI*, plaintiffs' claims against the State can also be considered final in that that decision effectively ended the litigation between those parties, leaving nothing for the court to do but to enforce the judgment if necessary. *See Ishihara Chemical*, 2000 WL 1898484, at *2 (citing *Ginett*, 962 F.2d at 1092). The merits of plaintiffs' claims against the State have now been completely resolved, as well as issues pertaining to plaintiffs' remedies against the State. Thus, the court finds that the finality aspect of Rule 54(b) certification is readily met here.

The third requirement—an express determination that there is no just reason for delay—"has *not* been taken lightly by this Circuit." *See HBE Leasing*, 48 F.3d at 631 (emphasis added). For instance, the Second Circuit has "found an abuse of discretion where entry of judgment has been accompanied by a mere repetition of the statutory language that 'there is no just reason for delay,' without any reasoned explanation for such determination." *Id.* (citations omitted). Simply put, "a certification that is conclusory or merely quotes the words of . . . Rule [54(b)] is insufficient." *L.B. Foster Co.*, 138 F.3d at 86 (citations omitted). By the same token, however, relying upon the seminal case of *Curtiss-Wright*, the Second Circuit has explained that "[w]here the court has directed the entry of final judgment as to claims that are separable from and independent of the unresolved claims, and has provided an informative explanation, its conclusion that there is no just reason for delay is entitled to 'substantial deference.'" *Id.* at 86-87 (quoting *Curtiss-Wright*, 446 U.S. at 10, 100 S. Ct. at 1466). Moreover, "[i]f the question of whether certification should have been granted is a close one, [the Second Circuit] will normally accept it if that course 'will make possible a more expeditious and just result for all parties.'" *Id.* (quoting *Gumer* v. *Shearson, Hammill & Co.*, 516 F.2d 283, 286 (2d Cir. 1974)).

In the present case there is no just reason for delaying an immediate appeal of the October 2, 2001 judgment. In its role as "'dispatcher'" under Rule 54(b) and in exercising its discretion thereunder, this court has determined that the "'appropriate time'" for the appeal of this final decision regarding plaintiffs claims' against the State is now. (*See Curtiss-Wright*, 446 U.S. at 8,

100 S. Ct. at 1465) (quoting *Sears, Roebuck*, 351 U.S. at 435 and 437, 76 S. Ct. at 899 and 900). Surely this case involving a wrong which occurred over 200 years ago and litigation spanning two decades is one of the few "infrequent harsh case[s]" warranting certification under Rule 54(b). *See L.B. Foster*, 138 F.3d at 86 (internal quotation marks and citations omitted). Reviewing plaintiffs' claims against the State at this juncture would best serve the needs of *all* litigants, including the non-State defendants. If on appeal plaintiffs' claims against the State are upheld and it remains liable for the entire amount of damages sustained by plaintiffs, that would obviate the need for any further litigation by the plaintiffs against the non-State defendants. Furthermore, even if the State pursues claims for contribution or indemnification or both against the non-State defendants, the tribal plaintiffs "should not be forced to await the outcome of that separate, distinct and independent quarrel before judgment is entered on [their] behalf." *See id.* (citation omitted). If, on the other hand, the court declines to certify plaintiffs' claims against the State for immediate appeal, a considerable delay would undoubtedly result as at least the tribal plaintiffs pursue their remaining claims against the non-State defendants.[4] Given that there are ap-

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[4] As will be more fully discussed above, at least at this juncture the U.S. is taking the position that it will not be pursuing any relief against the non-State defendants in this land claim action. Given the court's familiarity (borne from presiding over same for more than 20 years) with land claims in New York, it is extremely hesitant to speculate as to the future course of this lawsuit. In the court's experience, parties' litigation strategies frequently change, often times depending upon which way the political wind is blowing; so while the U.S.' current position is that it will not be pursuing any relief from the non-State defendants, the court can envi-

proximately 7,000 non-State defendants, the resulting delay from those subsequent trials is practically incomprehensible.

The likelihood of a substantial delay is exacerbated by the possibility that the tribal plaintiffs will not expeditiously pursue claims against the non-State defendants and in the meantime focus on settlement with the State instead. The court hastens to add, as it has always maintained, that settlement is a laudable goal here, and even at this advanced stage in the litigation the court continues to strongly encourage the parties to renew such efforts. In this regard, the court commends the U.S.' recent declaration that "[e]ven if the judgment becomes appealable, the [U.S.] stands willing to recommence settlement discussions and is willing to support reasonable stays before the District Court and the Second Circuit to facilitate settlement discussions." U.S. Resp. at 30.

In any event, clearly any danger of hardship or injustice, especially to the non-State defendants, could easily be alleviated by granting the tribal plaintiffs' motion for certification of an immediate appeal of the October 2, 2001 judgment. Given the course this litigation would take absent an immediate appeal of plaintiffs' claims against the State, *i.e.* countless trials involving 1000s upon 1000s of private landowner defendants, it is hard to imagine a case where the interests of judicial administration and efficiency would be better served by entry of a final judgment in accordance with Fed. R. Civ. P. 54(b). Furthermore, as the U.S. soundly reasons, "[a]llowing an appeal by the State prior to any

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sion that policy changing, especially if this lawsuit continues to proceed at a glacial pace.

further proceedings involving the other defendants is consistent with the Court's decision to bifurcate the damages trial as it may lead to a final resolution of all the issues in this case *without further burden on other parties.*" *Id.* at 30 (emphasis added). As the foregoing discussion also makes clear, the equities involved here, especially pertaining to the individual private landowners also weigh heavily in favor of granting the tribal plaintiffs' Rule 54(b) motion. Finally, the substantial public import of the issues which this land claim litigation raises, especially taking into account the considerable amount of prejudgment interest awarded, provides further justification for an immediate appeal of the October 2, 2001 judgment. *See Hudson River Sloop Clearwater* v. *Dept. of Navy*, 891 F.2d 414, 419 (2d Cir. 1989). In short, because all of the criteria for certification of an immediate appeal of this court's October 2, 2001 judgment under Rule 54(b) have been met, the court hereby grants the tribal plaintiffs' motion for such relief.

C. Motion to Dismiss

Currently the U.S.' policy with respect to New York land claims including the present one, is "*not* to seek relief from parties . . . that acquired lands from the State or subsequent landowners in good faith." United States' Motion to Dismiss all Defendants from United States' Complaint Excepting New York State ("U.S. Dismissal Memo.") at 5 (emphasis added). This represents a shift in policy from the time the U.S. first intervened in this lawsuit in 1992. At that time, mirroring the complaints of the tribal plaintiffs, the U.S. named several non-State entities as defendants as well as the class of private landowners. *See* U.S. Complaint in Intervention at ¶ 5. Since 1992 there have

been several legal developments which the U.S. claims have prompted it to change its policy in terms of the role of private landowners in New York land claim actions. Those legal developments are outlined in the U.S.' memorandum of law filed in support of this motion to dismiss, and there is no need to repeat the same herein. *See* U.S. Dismissal Memo. at 3-4.

Suffice it to say that after reviewing those legal developments, slightly more than a year ago, on the eve of a new federal government administration, the U.S. advised the parties in several of the New York land claims that "at the appropriate time[,]" it would be "fil[ing] motions . . . to hold that New York State is liable for any and all remedies awarded by the court and that the [U.S.] does *not* need the private landowners in its suit to obtain full relief from the State on behalf of the Tribes." *Id.* at 4 (internal quotation marks omitted). Thereafter, the U.S. began implementing that policy by, for instance, filing a motion to amend its complaints to omit the State as a defendant in *Canadian St. Regis Band of Mohawk Indians* v. *State of New York*, No. 82-CV-83, 82-CV-1114, 89-CV-829, another land claim action which is currently pending before this court. Just recently the court granted the U.S.' motion in that regard deleting "all claims and remedies against defendants other than the State and the [New York Power Authority]." *Canadian St. Regis Band of Mohawk Indians* v. *New York*, 205 F.R.D. 88, 90 (N.D.N.Y. 2002) (footnote omitted). The present motion is yet another example of the U.S. implementing this policy change with respect to private landowners who acquired their property in good faith.

As in *Canadian St. Regis*, the State does not oppose this motion by the U.S., explaining that in its view

"[t]here was never any good reason for the plaintiffs, including the . . . [U.S.], to pursue a claim for ejectment and for damages against the Counties and the individual landowners." *See* Roberts Ltr at 1. Calling the U.S.' motion "a welcome change in policy and rhetoric,"[5] the non-State defendants do not oppose this motion, but they view it as an "empty offer" given that the tribal plaintiffs are not making a similar motion. *See* Non-State Defendants' Response to the Plaintiffs' Post-Trial Motions at 4 (citation omitted).

The tribal plaintiffs *are* opposing this motion to dismiss, describing it as "premature" because the State has not adopted the view that it should be "held entirely and singularly liable for all damages in this case[.]" Cay. Oppn. Memo. at 12. In fact, as recently as November 19, 2001, the State "reiterate[d] and incorporate[d] its prior opposition to the Court's damages' rulings in this case, including but not limited to, the court's determination to hold the State responsible for all damages (including prejudgment interest) covering the entire period of the Cayugas' alleged dispossession." *See* Roberts Ltr at 1. As a point of clarification, the U.S. accurately notes that earlier in this litigation the court "interpreted the ['U.S.'] Complaint In Intervention as asserting claims for relief against the State . . . as well as the individual and State agency defendants included in the complaint and complaint in intervention of the tribal plaintiffs." *Id.* at 1-2 (citation omitted). Furthermore, the tribal plaintiffs point to the fact that the State has not yet "forsworn any claims for contribution or indemnification from the Non-State Defendants." *See* Cay. Oppn. Memo. at 12. The tribal

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[5] The non-State defendants improperly characterize the U.S.' motion as one to amend whereas it is actually a motion to dismiss.

plaintiffs also note that the State "has not abandoned its Eleventh Amendment defense, which, if successful, would relegate the Cayugas to pursuing their claims against the Non-State Defendants." *Id.* Lastly, the tribal plaintiffs observe that the State has indicated that it intends to appeal at least the issue of its liability. *See id.* Thus the tribal plaintiffs strongly urge this court to "hold in abeyance" the U.S. "motion to dismiss the non-State defendants pending the determination of *all* appeals." *Id.* (emphasis added).

There is no need to hold the U.S.' motion in abeyance. Given the procedural posture of this action, especially in recent years where the plaintiffs, albeit guided by rulings from this court, have been intent on pursuing relief from the State alone, the court hereby grants the U.S.' motion to dismiss all defendants from its complaint in intervention except the State of New York. Of course, at least for the time being the non-State defendants remain in this action by virtue of having been named in the tribal plaintiffs' respective complaints.

D. Interim Prejudgment Interest

In *Cayuga XVI*, this court did not explicitly address the issue of whether plaintiffs were entitled to recover prejudgment interest for the period between the jury's February 17, 2000, verdict and October 2, 2001, the entry date of the judgment ("interim prejudgment interest"). Implicit in *Cayuga XVI* was the assumption, however, that the $200 million plus prejudgment interest awarded therein included interest for that interim period as well as for the preceding years. One day after entry of the judgment the tribal plaintiffs immediately sought clarification of *Cayuga XVI*, asserting that the lack of any specific mention of interim prejudgment interest created a "potential ambiguity[.]"

See Affirmation in Opposition to Plaintiffs' Motion to Amend the Judgment (Nov. 14, 2001) ("Roberts Affirm."), exh. A thereto (Letter from Martin Gold to Court of 10/03/01). Vehemently opposing such clarification, the State responded by noting the potential for a substantial additional award of prejudgment interest above and beyond the roughly $211 million already awarded by the court. *See id.*, exh. B thereto (Letter from David Roberts to Court of 10/09/01 ("Roberts 10/09/01 Ltr") at 2-3). Refusing to award interim prejudgment interest, the court flatly stated "[t]hat [the October 2, 2001,] judgment will stand as a final order of this court[,]" and it "decline[d] to alter or amend same." *Id.*, exh. C thereto at 2. Despite the court's clear rejection of this request for interim prejudgment interest, the tribal plaintiffs are again seeking such interest. This time that request is in the form of a motion to amend the judgment made pursuant to Fed. R. Civ. P. 52(b), 59(e), and 60(a). *See* Tribal Plaintiffs' Amended Notice of Motion at 2, ¶ (b).

There are two components to the tribal plaintiffs' request for additional prejudgment interest. First, they are seeking such interest on the jury's $35 million dollar award for the fair market value of the claim area. Prejudgment interest on that award should include the time frame from February 27, 2000, the verdict date, through October 2, 2001, the entry date of the judgment. The tribal plaintiffs are proposing two different rates for that interest—"either at the *post*-judgment rate applicable to judgments entered at that time of 6.278%, *or* at the rate of 5.54% testified to by Dr. Berkman, compounded annually[.]" *Id.* (emphasis added). The tribal plaintiffs are also attempting to recover additional prejudgment interest "upon the jury's

rental award of $1,911,672.62 and the Court award of $211,000,326.80 of prejudgment interest thereon through June 30, 2000, calculated from June 30, 2000 to October 2, 2001." *Id.* The tribal plaintiffs are seeking additional prejudgment interest commencing on June 30, 2000, because in *Cayuga XVI*, the court adopted, with some modifications, the prejudgment interest calculations of the U.S.' economic expert, Dr. Berkman, but he only calculated such interest through June 30, 2000. According to the tribal plaintiffs, and in keeping with the formula employed by this court in *Cayuga XVI* of reducing Dr. Berkman's calculations by 60%, such interest should be awarded "at the rate of 5.54%, compounded annually and reduced by sixty (60%) percent[.]" *Id.*

Putting aside for the moment the issue of whether the tribal plaintiffs have any legal basis for their request for additional prejudgment interest, the court cannot overlook the practical implications of same. As has been the case since the prejudgment interest issue first arose in this case, the figures are not inconsequential. For instance, applying "Dr. Berkman's year 2000 rate of 5.54% compounded to the accrued rent principal and interest from July 2, 2000 to October 2, 2001 and then reduc[ing] that amount by 60%[,]" would result in additional prejudgment interest for rent of approximately six million dollars. Roberts Affirm. at 2, ¶ 5, and exh. D thereto. Calculating additional prejudgment interest on the $35 million jury verdict "using the post-judgment interest rate in effect on February 17, 2000, compounded annually[,]" would result in interim interest on that sum of $3,648,630.19. *Id.* at 2, ¶ 6; and exh. E thereto. Using the post-judgment interest rate

calculated in accordance with 28 U.S.C. § 1961(a),[6] which the State claims is 2.49% for the October 2, 2001 judgment, and reducing that amount by 60% would yield $569,827.86 in additional prejudgment interest on the $35 million jury verdict. See *id.* at 2, ¶ 6; and exh. F thereto.

In no uncertain terms the State responds that "the court should adhere to its prior ruling and refuse to amend the judgment to add approximately ten million dollars in additional prejudgment interest." St. Oppn. Memo. at 1. The court agrees with the State that the tribal plaintiffs' backdoor attempt to obtain additional prejudgment interest—interest the court has already refused to award—is completely unfounded. Although not framed as a motion for reconsideration, clearly that is what the tribal plaintiffs are seeking; yet they have not identified any of the three grounds that form the basis for such a motion in this district. *See, e.g., Sumner* v. *McCall*, 103 F. Supp. 2d 555, 557 (N.D.N.Y. 2000) (internal quotation marks and citations omitted) (emphasis added). ("Generally, the prevailing rule in the Northern District recognizes *only* three possible grounds upon which motions for reconsideration may be granted; they are (1) an intervening change in controlling law, (2) the availability of new evidence not previously available, or (3) the need to correct a clear error of law or prevent manifest injustice."). Moreover, in seeking interim prejudgment interest on the jury's $35

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[6] Unlike prejudgment interest rates, post-judgment interest rates are statutorily governed by 28 U.S.C. § 1961(a) which provides that "computations of post-judgment interest are based on the weekly average 1-year constant maturity Treasury yield, for the calendar week preceding the date of judgment." Roberts Affirm. (11/14/01), exh. B thereto (Roberts 10/09/01 Ltr at 2).

million damage award for the current value of the claim area, the tribal plaintiffs are conveniently overlooking the fact, as the State is quick to point out, that prior to the Phase II hearing regarding the issue of prejudgment interest, this court "stress[ed] . . . that any [such] interest award would be confined to the rental value damages award." *See Cayuga Indian Nation of New York* v. *Pataki*, Nos. 80-CV-930 and 80-CV-960 (N.D.N.Y. April 18, 2000) at 6. Finally, to the extent the tribal plaintiffs are maintaining that an award of interim prejudgment interest is mandatory, otherwise they will not have received full and just compensation, the court disagrees.

To support this argument, the tribal plaintiffs improperly rely upon *Magee* v. *U.S. Lines, Inc.*, 976 F.2d 821 (2d Cir. 1992). To be sure, there, the Second Circuit did remand that case because the district court denied plaintiff recovery of prejudgment interest, *see id.* at 823; but that was a maritime claim, and as this court noted in *Cayuga XVI*, in the maritime context "there is a 'traditional hospitality to prejudgment interest[.]'" *See Cayuga XVI*, 165 F. Supp. 2d at 295 (quoting *City of Milwaukee* v. *Cement Div., Nat. Gypsum Co.*, 515 U.S. 189, 196, 115 S. Ct. 2091, 2096, 132 L. Ed. 2d 148 (1995)). Thus, *Magee* does not in any way advance the tribal plaintiffs' argument that an award of interim prejudgment interest is mandatory in the present case.

Moreover, as with nearly all aspects of prejudgment interest, whether to award the same for the interim period between a verdict and entry of judgment lies within the court's sound discretion. *See, e.g., United States of America for the Benefit of Towerridge, Inc.* v. T.*A.O., Inc.*, No. Civ-95-42-BL, 1996 WL 924671, at *3 (W.D. Okl. June 11, 1996) ("The court in its discretion

and based on equitable considerations finds that prejudgment interest should be awarded on the amount of the verdict beginning on the 13th day of November, 1994, until the date of judgment."). Here, the court declines to exercise that discretion to make such an award. In its 100 page decision in *Cayuga XVI*, this court thoroughly addressed the prejudgment interest issue and made what is undeniably a substantial award of same to the tribal plaintiffs. Such interest, in combination with the jury's verdict of $36,911,672.62 has resulted in the tribal plaintiffs receiving full and just compensation even without an award of interim prejudgment interest.

E. Exclusivity of Judgment

Inadvertently omitted from the October 2, 2001 judgment was any reference to the U.S., as plaintiff-intervener on behalf of the tribal plaintiffs. Evidently this omission prompted the State's motion pursuant to Fed. R. Civ. P. 59(e) to amend that judgment "to run solely, *or at least jointly*, in favor of the [U.S.] as trustee for all successors-in-interest of the historic Cayuga Indian Nation." St. Supp. Memo. at 26 (footnote omitted) (emphasis added).[7] The State reasons that such an amendment is necessary to ensure that "[t]he [U.S.,] either by itself or under judicial supervision, will thereby be responsible for ensuring that any judgment issued in this case is allocated appropriately among all tribes that are descended from the historic Cayuga, including the plaintiffs and any other such tribes that may have standing to sue under the Nonintercourse

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[7] The State is seeking this amendment in the event the court does not vacate the judgment. Obviously, because the court refuses to vacate the judgment, it must address this motion to amend the judgment.

Act . . . ." *Id.* at 26-27 (footnote omitted). The State offers three separate reasons as to why the judgment should be amended. From the State's perspective, through such an amendment "the Court will ensure: (1) that all descendants of the historic Cayuga Indian Nation share in the award in this case, which by its own terms provides full compensation for the harm allegedly suffered by the Nation in 1795 and 1807; (2) that further judicial resources will not be unnecessarily expended on this claim; and (3) that the State and other defendants will not be subjected to the possibility of multiple liability for a single harm to the Nation." *Id.* at 27.

Although it agrees that "the Court should amend the judgment to reflect that the judgment runs jointly in favor of the [U.S.], the Cayuga Indian Nation, and the Seneca-Cayuga Tribe," the U.S. specifically requests that "the Court defer consideration of the State's suggestion that the judgment run *exclusively* in favor of the [U.S.]" *See* U.S. Resp. at 1 (emphasis added). In a similar vein, the tribal plaintiffs do not object to modification of the judgment to run jointly in their favor, as well as in favor of the U.S., as trustee for the tribal plaintiffs. *See* Cay. Oppn. Memo. at 13. The tribal plaintiffs do object, however, to amending the judgment as the State suggests "for the potential benefit 'of all successors-in-interest of the historic Cayuga Indian Nation.'" *Id.* at 14 (quoting St. Supp. Memo. at 26). From the tribal plaintiffs' viewpoint, such an amendment "would convert this from a judgment awarded to benefit the two specific tribal plaintiffs to an open-ended class-action type judgment fund that could be used to pay future damage awards to an ill-defined class of non-parties and other strangers to this litigation." *Id.* The court does not agree with this characterization

of the State's motion, but for the reasons set forth below it does agree with the U.S. and the tribal plaintiffs that the proper way to proceed at this juncture is to amend the October 2, 2001 judgment to reflect that the U.S., as trustee for the tribal plaintiffs, is also a plaintiff-intervener in this action and the judgment runs jointly in favor of the U.S. and those plaintiffs.

Basically Rule 60(a) allows a court to correct clerical errors in a judgment "at any time of its own initiative or on the motion of any party[.]" Fed. R. Civ. P. 60(a). As that Rule allows and because the parties readily agree, as just indicated, the court will amend the October 2, 2001 judgment to reflect that that judgment runs jointly in favor of the U.S. and the tribal plaintiffs.

To the extent that the State is seeking to amend that judgment to run exclusively in favor of the U.S., however, the court denies the State's motion. The U.S. identifies several persuasive reasons as to why at this time the court should *not* hold that the judgment runs exclusively in favor of the U.S. Perhaps most significant is the fact that "this issue [of exclusivity] raises questions of both law and policy for the [U.S.] and for the tribal plaintiffs, including, for example, whether the [U.S.] and/or the tribal plaintiffs should hold the principal jointly or exclusively, how the principal should be allocated between the New York Cayuga, the Seneca-Cayuga, and other potentially interested parties, and how the principal should be invested and disbursed." U.S. Resp. at 27. The court concurs with the U.S.' assessment of these important law and policy concerns, which, if possible, should be resolved outside the litigation arena:

> The ramifications of such decision need to be analyzed by decision makers at the Interior and Justice Departments, as well as by the tribal plaintiffs. The Plaintiffs also need to come together and consult with each other in the aim of coming to a resolution that ideally would alleviate any need for further court involvement in how the money should be handled.

Id. To date, such discussions have not occurred, but the court places great credence in the U.S.' representation that between now and the time the judgment is actually executed, it "will work toward an agreement with all the Plaintiffs that ideally would be presented jointly to the Court." *Id.* In light of the foregoing, the court hereby grants the State's motion to amend the judgment to provide that the judgment runs jointly in favor of the plaintiff-intervener the U.S., as trustee, *and* the tribal plaintiffs. The court denies the State's motion without prejudice to renew, however, to the extent that the State is seeking to amend the judgment to reflect that it runs exclusively in favor of the U.S.

II. New Trial

A. State Defendants' Motions

1. Vacate Judgment & JMOL

As Fed. R. Civ. P. 50(b) permits, the State is renewing its motion for judgment as a matter of law. Then, as now, the State is challenging the opinion testimony of the U.S.' expert real estate appraiser, Arvel Hale, contending that his "sales data were unreliable" and his "methodology failed to meet the standards of

Daubert and *Kumho Tire*[.]"[8] St. Supp. Memo. at 3 and 8. Thus the State asserts that "the court should enter judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b) and dismiss plaintiffs' claim for damages *and* prejudgment interest against the State defendants[.]" *Id.* at 1 (emphasis added). In other words, the State is seeking to nullify both the jury verdict and this court's subsequent prejudgment interest decision so that it will bear no financial responsibility for violating the Non-intercourse Act in its dealings with the Cayuga in 1795 and again in 1807.

This is not the first time the court has had before it challenges to the reliability of Mr. Hale's sales data and to his methodology. In fact, the State has previously made these arguments on three separate occasions: (1) as part of its pre-Phase I motion *in limine* to preclude Hale's testimony; (2) in connection with the seven day *Daubert* hearing; and (3) as part of the State's

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[8] As the parties are well aware, "[i]n *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), the Supreme Court instructed that the Federal Rules of Evidence require the trial court to 'ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.'" *Brooks* v. *Outboard Marine Corp.*, 234 F.3d 89, 91 (2d Cir. 2000) (quoting *Daubert*, 509 U.S. at 589, 113 S. Ct. 2786). Subsequently, in *Kumho Tire Co., Ltd.* v. *Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), the Supreme Court made "clear that this gate-keeping function applies not just to scientific expert testimony" as discussed in *Daubert*, but also to testimony based on "'technical' and 'other specialized' knowledge.'" *Id.* (quoting *Kumho Tire*, 526 U.S. at 141, 119 S. Ct. 1167) (quoting in turn Fed. R. Evid. 702). In accordance with this case law, this court conducted a comprehensive *Daubert* hearing with respect to the three real estate appraisers which the parties retained to value the claim area. *See Cayuga Indian Nation of New York* v. *Pataki*, 83 F. Supp. 2d 318 (N.D.N.Y. 2000) ("*Cayuga XIII*").

motion for judgment as a matter of law made at the close of all of the proof during Phase I. Each time the court rejected the State's challenges. Following the *Daubert* hearing the court found, among other things, that Hale's testimony was both "reliable and relevant[,] . . . and w[ould] assist the jury in deciding the property valuation issue[.]" *See Cayuga XIII*, 83 F. Supp. 2d at 328. At the close of the Phase I proof, the State again attacked Mr. Hale's testimony and the court again rejected that attack, denying the State's Rule 50 motion in that regard. *See* Transcript (Feb. 10, 2000) at 2310-29. There is nothing in this renewed motion by the State which convinces the court at this late date to alter its prior decisions.

Besides offering nothing more than a rehash of arguments, the court hastens to add that the State's renewed Rule 50 motion improperly focuses solely upon the proof presented through Hale, rather than upon the record as a whole. *See Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 2110, 147 L. Ed. 2d 105 (2000) (emphasis added) ("[I]n entertaining a motion for judgment as a matter of law, the court should review *all* of the evidence in the record."). When the court, as it must, considers not just Mr. Hale's testimony, but the record as a whole pertaining to property valuation, it remains convinced that there is no basis for the State's challenge to *either* his data or his methodology. The weaknesses in the State's argument become all the more apparent taking into account the "strict" standard which the State must satisfy before it would be entitled to judgment as a matter of law. *See Stubbs* v. *Dudley*, 849 F.2d 83, 85 (2d Cir. 1988). "Judgment as a matter of law is proper under Fed. R. Civ. P. 50 *only* if, without weighing the credibil-

ity of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [persons] could have reached." *Caruso* v. *Forslund*, 47 F.3d 27, 32 (2d Cir. 1995) (emphasis added) (internal quotation marks and citations omitted).

Given the undeniably novel valuation issues presented by the damage phases of this litigation, as the record makes abundantly clear, most certainly this is *not* a case where "there c[ould] be but one conclusion as to the verdict that reasonable [persons] could have reached." *See id.* Indeed, again largely because of the unique property valuation issues presented herein, there were a myriad of conclusions which reasonable persons could have drawn from the Phase I record evidence. Moreover, adopting the State's arguments regarding Hale's testimony would require the court to make credibility determinations, weigh the evidence, or both, and that is *not* a court's function on a Rule 50 motion such as the present one. *See Raniola* v. *Bratton*, 243 F.3d 610, 616 (2d Cir. 2001).

Finally the court observes that "the Second Circuit espouses a particularly broad standard for the admissibility of expert testimony[,]" such that "after *Daubert* . . . rejection of expert testimony is the exception rather than the rule." *See Colon* v. *BIC USA, Inc.*, No. 00 CIV. 3666, 2001 WL 1631402, at * 11 (S.D.N.Y. Dec. 19, 2001) (internal quotation marks and citations omitted). Accordingly, as it has each and every time it has been presented with the State's opposition to Mr. Hale's testimony, the court rejects those arguments and denies the State's motion for judgment as a matter of law based on same.

B. Alternative Relief

Because the court has denied the State's motion for judgment as a matter of law, it must next consider the State's motion for alternative relief. In particular, alternatively, the State is seeking to have the court "either reconsider its calculation of prejudgment interest *or* order a new jury trial concerning the rental value of the property in the claim area." St. Supp. Memo. at 17 (emphasis added). The State reasons that such relief "is appropriate because the jury seriously misjudged the year by year fair rental value of the claim area *and* the Court explicitly declined to take this mistake into account in its discretionary calculation of prejudgment interest." *Id.* at 18 (footnote omitted) (emphasis added).

1. Prejudgment Interest Recalculation

The State's motion for recalculation of the prejudgment interest award suffers from the same infirmity as its motion for judgment as a matter of law: the State is not offering any new arguments which would justify such reconsideration. In arguing that the court should reconsider its calculation of prejudgment interest, the State contends that "[t]he fair rental values indicated on the verdict form do not comport either with the Court's instructions to the jury or with the testimony at trial." *See id.* at 19. The court discussed and resolved both of those issues in *Cayuga XVI*. *See Cayuga XVI*, 165 F. Supp. 2d at 273-84; and 358-363. Furthermore, as the U.S. accurately notes, the State has "present[ed] no facts or law contradicting the Court's finding[s]" in this regard. U.S. Resp. at 18.

Moreover, the court agrees with the U.S.' observation, made in a slightly different context, that the

State's arguments have not become more persuasive by repetition. *See id.* at 4. Nor does repetition of these previously unavailing arguments satisfy the "demanding standard" for reconsideration in this Circuit. *See Sumner*, 103 F. Supp. 2d at 558. As Judge Kahn so aptly wrote in *Sumner*, "[a] simple difference of opinion, no matter how deep it runs, will not warrant reconsideration." *Id.* at 558-59. Rather than amounting to a clear error of law, which is a possible basis for reconsideration, the court's prior rulings as to the fair rental value aspect of the jury's verdict, which the State again is disputing, are "'simply a point of disagreement between the Court and the litigant[,]'" and do not provide a sufficient basis for disturbing the jury verdict. *See id.* at 559 (quoting *In re C-TC 9th Ave. Partnership*, 182 B.R. 1, 3 (N.D.N.Y. 1995)). Accordingly, the court hereby denies the State's motion for reconsideration, seeking to have the court recalculate the amount of prejudgment interest due in this case.

2. Fair Rental Value Damages

If the court declines, as it has, to modify its prejudgment interest calculation, then the State is moving for a new trial "solely on the issue of fair rental value damages." *See* St. Supp. Memo. at 26. In making this motion, the State is relying upon Fed. R. Civ. P. 59(a), which generically provides that a district court may grant a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a)(1). The State again harkens back to its previously unsuccessful argument that "[t]he jury's conclusion that the fair rental value was an identical $17,156.86 in each year is unsupported by the record." St. Supp. Memo. at 23. Taking that argument one step farther, the State

contends that the jury's findings as to fair rental value "go[] beyond a simple judgment call regarding credibility issues[.]" *Id.* Rather, according to the State, "the jury reached a seriously erroneous result, and given the adverse impact that this verdict has when prejudgment interest is awarded on the basis of the jury's figures, the verdict amounts to a miscarriage of justice." *Id.* (citations omitted). If the court agrees with the State and grants this motion for a new trial, the State further contends that the court "must also vacate its award of prejudgment interest since that award was based on the jury's verdict." *Id.* at 26 (footnote omitted). In other words, the State is attempting to get in through the backdoor what it could not get in through the front door, *i.e.* recalculation of the prejudgment interest award.

Other than the broad, general statements set forth above, the State does not provide any substantive reasons as to why the court should grant a new trial. Presumably the same arguments which formed the basis for the State's argument that the court should recalculate the prejudgment interest award, *i.e.* the verdict does not conform with the court's instructions or with the testimony, also form the basis for this motion for a new trial. These arguments carry no more weight just because the State is seeking different relief, that is a new trial instead of reconsideration. As the Second Circuit recently clarified, "a decision is against the weight of the evidence, for purposes of a Rule 59 motion, *if and only if* the verdict is seriously erroneous or a miscarriage of justice." *Farrior* v. *Waterford Board of Education*, 277 F.3d 633, 635 (2d Cir. 2002) (emphasis added). Put in a slightly different way, "[u]nder Rule 59, a new trial will *only be granted* if the

court determines that the 'verdict was against the weight of the evidence [and that] the jury has reached a seriously erroneous result or . . . the verdict is a miscarriage of justice.'" *Jackson* v. *Town of Hempstead*, No. 98-CV-5635, 2002 WL 199834, at *2 (E.D.N.Y. Feb. 4, 2002) (quoting *Farrior*, 277 F.3d at 635) (emphasis added). Here, the State has not satisfied that stringent standard. Instead, it is merely reiterating arguments which the court has previously rejected, albeit in a slightly different context—that is, calculation of the prejudgment interest award.

However, the State is making a new procedural argument. In *Cayuga XVI*, this court observed that "in all likelihood, the State *did* waive its right to object to the jury's verdict as inconsistent[.]" *Cayuga XVI*, 165 F. Supp. 2d at 278 n.5. In light of that observation, although the State and the U.S. devote a fair amount of attention to their respective waiver arguments, there is no need to address the same. First of all, as the court stressed in *Cayuga XVI*, because there was no need to, it did "*not* definitively hold that the State ha[d] waived its right to object to the verdict as inconsistent[.]" *Id.* (emphasis added). Thus, to the extent the State is relying upon a finding of waiver as a possible basis for a new trial, that reliance is misplaced. Of equal if not more import is the fact that the State has not shown how the waiver issue supports a finding that somehow it is entitled to a new trial. Consequently, in all respects the court denies the State's motion for a new trial.

III. Stay

The State is seeking a stay of execution of the $247,911,999.42 judgment in this case pending appeal. First, the State is attempting to secure an automatic stay pursuant to Fed. R. Civ. P. 62(f). Failing that, the

State maintains that alternatively the court should grant a stay pursuant to Fed. R. Civ. P. 62(d) and (h). The State further maintains that the court also should waive the posting of a supersedeas bond.[9] The State only mentions in passing Rule 62(h), which "allows a court certifying a judgment under Rule 54(b) to stay its enforcement until the entering of a subsequent judgment or judgments." *See Curtiss-Wright*, 446 U.S. at 13 n. 3, 100 S. Ct. at 1467 n.3. Thus, given that the State has confined its analysis to the propriety of a stay under Rule 62(f) or 62(d), the court will limit its analysis accordingly.

A. Rule 62(f): Automatic Stay

Relying upon Fed. R. Civ. P. 62(f), the State asserts that it is entitled to an automatic stay of the judgment in this case. Basically that Rule "adopts the state provisions of the forum state [but] *only* where the underlying judgment is 'a *lien upon* the *property of the judgment debtor*' in that state (i.e., where there is the functional equivalent of a bond in terms of security)." *Federal Insurance Company* v. *County of Westchester*, 921 F. Supp. 1136, 1138 (S.D.N.Y. 1996) (quoting Fed. R. Civ. P. 62(f)) (emphasis added). As several courts have recognized, Rule 62(f) "is unambiguous." *Id.* (quoting *Marandino* v. *D'Elia and JOFR Assocs.*, 151 F.R.D. 227, 229 (D. Conn. 1993)). Thus, "'[a]s a pre-

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[9] A supersedeas bond is "required of one who petitions to set aside a judgment or execution and from which the other party may be made whole if the action is unsuccessful." *Adsani* v. *Miller*, 139 F.3d 67, 70 n.2 (2d Cir. 1998) (internal quotation marks and citation omitted). "In addition, 'supersedeas' refers to the name of the writ containing a command to stay proceedings at law, suspending the power of the trial court to execute on the judgment appealed from." *Id.* (citations omitted).

requisite, a judgment must be a lien in the state where the district is located.'" *Id.* Even in the face of Rule 62(f)'s plain language, and the State's ready admission that the judgment herein "is *not* a lien upon [its] real property[,]" the State nonetheless urges the court to enter an automatic stay under that Rule. *See* St. Supp. Memo. at 36 (emphasis added) Although unstated, evidently the State is urging the court to expand Rule 62(f) beyond its plain meaning because if a "judgment debtor, [such as the State,] shows that it has met the requirements of [that] Rule[,]" then "a district court *must* grant a stay *without* a supersedeas bond [.]" *FDIC* v. *Ann-High Associates*, No. 97-6095, 1997 WL 1877195, at *4 (2d Cir. Dec. 2, 1997) (citing *Hoban* v. *Washington Metro. Area Transit Auth.*, 841 F.2d 1157, 1158 (D.C. Cir. 1988)) (emphasis added). In contrast, as will be more fully discussed below, ordinarily a party seeking a stay of a judgment pursuant to Rule 62(d) must post a supersedeas bond.

Correctly viewing Rule 62(f) as inapplicable here, the tribal plaintiffs succinctly respond that "the State has no 'automatic' entitlement to a stay in this action." Cay. Oppn. Memo. at 17. The U.S. agrees that an automatic stay is not appropriate, and urges the court to "decline to adopt New York's suggestion that it expand Rule 62(f) to apply to judgments that do not impose liens upon real property." U.S. Resp. at 31. There is no need for the court to become mired down in the State's argument for an expansion of Rule 62(f) because, as will be more fully discussed below, under the unique facts of this case the court deems it a proper exercise of its discretion under Rule 62(d) to both grant a stay pending appeal *and* to waive the State's posting of a supersedeas bond.

B. Rule 62(d): "Discretionary" Stay

Subject to the exceptions set forth in Rule 62(a), none of which apply here, Rule 62(d) provides in pertinent part that "[w]hen an appeal is taken the appellant by giving a supersedeas bond *may* obtain a stay[.]" Fed. R. Civ. P. 62(d) (emphasis added). As will be more fully explained below, the State automatically would be entitled to a stay under Rule 62(d) if it were willing to post a supersedeas bond, but it is not. Instead, not only is the State seeking a stay of the judgment pending appeal, but it is also seeking to have the court invoke "equitable principles" under Rule 62(d) to waive the posting of a supersedeas bond. *See* St. Supp. Memo. at 38 and 46.

In deciding whether an appellant is entitled to a stay under Rule 62(d), a court should consider four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably harmed absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

County of Westchester, 921 F. Supp. at 1138 (quoting *Hilton* v. *Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 2119, 95 L. Ed. 2d 724 (1987)). Flexibility is essential when considering those factors. *See Morgan Guar. Trust Co.*v. *Republic of Palau*, 702 F. Supp. 60, 65 (S.D.N.Y. 1988), *vacated on other grounds*, 924 F.2d 1237 (2d Cir. 1991). Separately analyzing the four factors enumerated above, the State concludes that each of them is easily met and hence it is entitled to a stay of the judgment.

The U.S. "does *not* object to the State's request for a stay pending appeal pursuant to Rule 62(d)[,]" but rather than examining the four *Hilton* factors identified above, it "believes" that the State's purported status as a solvent judgment creditor "is controlling[.]" *See* U.S. Resp. at 33. Thus the U.S. reasons, "there is little to no risk of harm to the Plaintiffs if the Court grants a stay here." *Id.*

The tribal plaintiffs are taking the exact opposite view, maintaining that in deciding the propriety of a stay, the court should examine each of the four factors enumerated above. When the court does that, the tribal plaintiffs assert that the State is unable to meet its "burden as to *any* of the four elements, let alone all of them." Cay. Oppn. Memo. at 18. Consequently, they contend that it is not proper to stay execution of the judgment in this case. Recognizing the right to an automatic stay under Rule 62(d) in conjunction with the posting of a bond, however, the tribal plaintiffs do not object to a stay if the States "post[s] . . . a bond sufficient to cover the judgment during the anticipated protracted appeal." *Id.* at 20.

As the foregoing outline of the parties' respective positions shows, in deciding whether the State is entitled to a stay, the first issue is whether the court should invoke the "familiar" four-part formula of the Supreme Court, *see County of Westchester*, 921 F. Supp. at 1138, or whether, as the U.S. contends, it should disregard those factors and simply rely upon the State's purported solvency as a judgment creditor.

There is some validity to the U.S.' assertion that resolution of the stay issue does not require an analysis of the four *Hilton* factors. It is not as the U.S. suggests, however, the State's claimed status as a solvent

creditor which is dispositive. Despite the seemingly discretionary language of Rule 62(d) (*i.e.*, an appellant "*may* obtain a stay"), there is a significant body of case law "interpret[ing] [that] Rule . . . as entitling an appellant to a *stay* as a *matter of right* upon posting of a supersedeas bond *or* upon the court's waiver of the bond requirement where the appeal is taken from a monetary judgment or its equivalent." *Yankton Sioux Tribe* v. *Southern Missouri Waste Management District*, 926 F. Supp. 888, 890 (D.S.D. 1996) (and cases cited therein) (emphasis added). Plainly any appeal in the present case will be from a monetary judgment. Thus after *Yankton Sioux*, if the State prevails on its waiver of bond argument, arguably it would be entitled to a stay as a matter of right. Analyzing the stay issue in this way, would obviate the need for a separate analysis of the four stay factors articulated above.

In an abundance of caution, however, and because there is some support for analyzing the stay issue first and then proceeding to the waiver issue,[10] the court will consider the four stay factors. When it does that, even in a rather cursory manner, the court has little difficulty finding that a stay of the execution of this $247,911,999.42 judgment is warranted. The fact that

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[10] *See, e.g., Endress + Hauser, Inc.* v. *Hawk Measurement Systems Pty. Ltd.*, 932 F. Supp. 1147, 1148 (S.D. Ind. 1996) ("Initially, we must decide whether Hawk is entitled to a stay pending appeal. If we find that a stay is appropriate, we must then decide whether to waive the supersedeas bond requirement and allow some form of alternate security[.]"); *John Hancock Mutual Life Ins. Co* v. *Amerford International Corp.*, No. 91 Civ. 8635 (JFK), 1993 WL 515376, at *1 (S.D.N.Y. Dec. 8, 1993) ("Prior to deciding whether the equities of this case require the posting of a partial supersedeas bond (or no bond at all), it is necessary first to consider whether the Court should order a stay at all.").

"applications for stays are generally granted[,]" *see John Hancock*, 1993 WL 515376, at *1, lends further credence to the court's determination that the unique facts of this case mandate staying execution of the judgment herein.

Addressing the four stay elements in reverse order, the court finds there is a broader public interest at stake here which strongly favors granting a stay—the impact a stay or denial of a stay will have on New York State taxpayers. As the State's Director of the Division of the Budget, Carole E. Stone, avers, and the court agrees, "it [would be] against the public interest to pay the judgment before appeals are finally exhausted[,] . . . and would seriously prejudice the taxpayers." Affidavit of Carole E. Stone (Oct. 16, 2001) at 2, ¶¶ 2 and 4. As Ms. Stone convincingly explains, immediate payment of this nearly $250 million judgment would seriously prejudice State taxpayers because if the "monies were spent on purchasing land, buildings or other capital items, and the judgment were later overturned, it could be extremely difficult and disruptive to recover any funds already expended." *Id.* at ¶ 4. The court also agrees with the State's observation that "in the event of a reversal on appeal, the plaintiff Tribes, which have limited resources, may not be able to repay any funds that they spend during the pendency of the appeal." *Id.* This too bolsters the court's finding that the broader public interest *vis-a-vis* New York State taxpayers as a whole augurs in favor of granting a stay.

Furthermore, as detailed more fully in the affidavits of Raymond E. Lockwood, Vice-Chairman of the Cayuga County Legislature, and Robert W. Hayssen, Chairman of the Seneca County Board of Supervisors,

the court finds that without a stay there is a very real possibility that other parties interested in this litigation will be substantially harmed. Such harm could result from a significant loss in the Counties' respective tax bases if during what will undoubtedly be a lengthy appeal process, the tribal plaintiffs use judgment monies to purchase land in the claim area—land which would be non-taxable, thus reducing the Counties' tax bases and tax revenue generally. *See* Affidavit of Raymond E. Lockwood (Oct. 12, 2001) at 2, ¶¶ 5- 7; and Affidavit of Robert W. Hayssen (Oct. 15, 2001) at 2, ¶¶ 5-7. In short, as in *River Oaks Marine, Inc.* v. *Town of Grand Island*, No. 89-CV-1016S, 1992 WL 406813 (W.D.N.Y. Dec.10, 1992), "[m]any innocent third parties may suffer if execution is allowed to proceed." *Id.* at *1 (citing *Olympia Equipment* v. *Western Union Telegraph Co.*, 786 F.2d 794 (7th Cir. 1986)). Moreover, the court cannot ignore the fact that there would be no concomitant harm to the tribal plaintiffs if it grants a stay because they would be entitled to post-judgment interest. *See* 28 U.S.C. § 1961.

On the other hand, the State cannot show the requisite irreparable harm absent a stay. The State's argument of irreparable harm is seriously undermined "by the well-established principle that quantifiable money damages cannot be deemed irreparable harm." *See Harris* v. *Butler*, 961 F. Supp. 61, 63 (S.D.N.Y. 1997) (citing, *inter alia*, *Tucker Anthony Realty Corp.* v. *Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989)). Because the judgment herein is only for "quantifiable money damages," the State is unable to establish this particular stay element.

As to the likelihood of success on appeal, "court[s] ha[ve] required only that the petitioner demonstrate a

'substantial case on the merits,' even if ultimate success is not a mathematical probability." *Morgan Guar. Trust*, 702 F. Supp. at 65 (citing *Washington Metropolitan Area Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)). Here, there is no need to engage in a detailed analysis of the relative merits of any appeal by the State. As the court in *Morgan Guar. Trust* so succinctly put it, "because of the difficulties of the issues . . . presented, it would be foolhardy to predict that there is no likelihood of success on appeal." *Id.* Moreover, as the D.C. Circuit recognized in *Holiday Tours*, "'tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo be maintained.'" *Id.* at 66 (quoting *Holiday Tours*, 559 F.2d at 844-45). The difficult legal questions which have arisen during the course of this more than twenty-year old litigation are legion. Furthermore, as detailed in the Stone, Lockwood and Hayssen affidavits, given the potential for significant disruption to the centuries-old status quo, the equities overwhelmingly favor maintaining the status quo pending appeal. Given the unique nature of this land claim litigation and the myriad of novel legal issues presented nearly every step of the way, particularly in the more recent damage phases, this case cries out for maintenance of the *status quo*. Simply put, even though denial of a stay would not result in irreparable harm to the State, because the other factors tip decidedly in favor of a stay, the court finds such relief is justified.

Having determined that the unique facts of this case mandate staying execution of the judgment, the court must next address the State's contention that it should not be required to post a supersedeas bond in this case.

Arguing that as a "sovereign . . . plainly [it] has the financial ability to pay the full judgment with accrued interest[,]" the State maintains that the court should waive the posting of a bond. St. Supp. Memo. at 47 (citing Stone Aff. at ¶¶ 2, 3 and 5) (other citation omitted). The State further offers that the posting of a bond "is unnecessary . . . and against the broader public interest." *Id.* Finally, if the court declines to waive the posting of a bond and finds that an alternative form of security or a reduced bond is required, then "the State submits that there should be further proceedings conducted to determine the nature and amount of security that would be appropriate[.]" *Id.* at 48.

"[A]ccept[ing] the State's representations that it will make good as a judgment creditor," the U.S. "does *not* object to the State's request to waive a bond[]" pending appeal. U.S. Resp. at 1 (emphasis added). More specifically, relying upon the State's assurances through its Director of the Division of Budget that "it will satisfy any judgment determined after exhausting appeals[,]" the U.S. asserts that waiver of a supersedeas bond is proper here. *Id.* at 34 (citing Stone Aff. at ¶¶ 2, 3, and 5). Moreover, the U.S. points to the potential for "wast[ing] the State's resources[]" if the State is forced to obtain a bond. *Id.*

Again in contrast to the U.S., the tribal plaintiffs *do* object to waiving the bond requirement for the State. The tribal plaintiffs posit two reasons why waiver of the supersedeas bond is not proper. First they challenge the State's assertion that it can satisfy the judgment upon legislative appropriation, speculating because "of the political controversy surrounding this case[,]" plaintiffs may "face an attempt by the State to

block final payment in some way by politicians with a 'Native American' agenda." Cay. Oppn. Memo. at 20. Second, the tribal plaintiffs question the State's ability to pay the judgment if, as the State suggests, it will have difficulty posting a bond.

"It is commonly understood that '[t]he purpose of a supersedeas bond is to preserve the status quo while protecting the non-appealing party's rights pending appeal.'" *Harris*, 961 F. Supp. at 62 (quoting *Poplar Grove Planting and Refining Co., Inc.* v. *Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1190-91 (5th Cir. 1979)) (other citation omitted). The requirement of posting a supersedeas bond "serves three purposes—*viz.*, it allows an appellant to pursue an appeal without first satisfying the judgment, it protects an appellee's rights and ability to collect the judgment and it guarantees an appellee the costs of delay incident to the appeal." *Brabson* v. *Friendship House of Western New York, Inc.*, No. 94-CV-0834, 2000 WL 1335745, at *1 (W.D.N.Y. Sept. 6, 2000) (citation omitted). "In spite of the general requirement that a judgment debtor post a supersedeas bond in the full amount of the judgment, . . . , the district court, in its discretion, may use equitable principles to grant such a stay without a full bond if the filing of a supersedeas bond would irreparably harm the judgment debtor and, at the same time, such a stay would 'not unduly endanger the judgment creditor's interest in ultimate recovery.'" *Port Chester Electrical Construction Corp.*v. *HBE Corp.*, No. 86 Civ. 4617, 1991 WL 258737, at *1 (S.D.N.Y. 1991), *rev'd on other grounds*, 978 F.2d 820 (2d Cir. 1992) (quoting *Texaco Inc.* v. *Pennzoil Co.*, 784 F.2d 1133, 1155 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1, 107 S. Ct. 1519, 95 L. Ed. 2d 1 (1987)) (other

citation omitted). In this regard, the Second Circuit has "held that in some circumstances an 'inflexible requirement' for 'denial of a stay of execution unless a supersedeas bond is posted' can amount to unjust confiscation of the debtor's property[.]" *Liberty Mut. Ins. Co.* v. *Bankers Trust Co.*, 769 F. Supp. 130, 131 (S.D.N.Y. 1991) (quoting *Texaco*, 784 F.2d at 1154) (other citation omitted). Other factors germane to the determination as to whether to waive the posting of a bond include "the degree of confidence that the district court has in the availability of funds to pay the judgment . . . ; [w]hether the defendants' ability to pay the judgment is so plain that the cost of a bond would be a waste of money . . . ; and '[w]hether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendants in an insecure position[.]'" *Dillon* v. *City of Chicago*, 866 F.2d 902, 904 (7th Cir. 1988) (internal quotation marks and citations omitted).

The State, as the moving party, has the burden of "objectively demonstrat[ing]" the reasons why the court should "depart from the usual requirement of a full security supersedeas bond to suspend the operation of an unconditional money judgment[.]" *See Port Chester Electrical*, 1991 WL 258737, at *2 (internal quotation marks and citation omitted). In this vein, it should be noted that "[a]lthough courts sometimes waive the full supersedeas requirement, they often require alternative security considerably in excess of the amount of the judgment." *Id.* (citations omitted).

The waiver issue need not detain the court for long. Given its status as a "sovereign taxing authority[,]" *see* Stone Aff., at 2, ¶ 5, the court is confident in the State's ability to pay the judgment herein. *See Ortiz* v. *New*

York City Housing Authority, 22 F. Supp. 2d 15, 40 (E.D.N.Y. 1998), *aff'd on other grounds*, 198 F.3d 234, 1999 WL 753153 (2d Cir. 1999) (granting motion for stay of execution with waiver of supersedeas bond because, as a government subdivision, City Housing Authority had "ample means" to satisfy the judgment); *River Oaks Marine*, 1992 WL 406813, at *2 (granting defendants' motion to stay execution of judgment without posting a bond or obtaining other security because, *inter alia*, defendant was a municipal corporation); *accord Norco Constr., Inc.* v. *King County*, 106 Wash. 2d 290, 721 P.2d 511, 514 (1986) (state and counties exempt from posting supersedeas bonds because the government treasuries serve as guarantees that any award of damages can be collected). Relying in part upon the Director of the Division of Budget's averment that "the plaintiffs can be secure that upon legislative appropriation, any judgment, and statutory post-judgment interest, will be paid by the State[,]" plaintiffs' rights and their ability to collect on this judgment against the State will not be jeopardized during the appeal process even without the posting of a bond. *See* Stone Aff. at 2, ¶ 5. Furthermore, because plaintiffs will be entitled to post-judgment interest which, as just noted, the State recognizes it must pay, a bond is not needed to ensure plaintiffs the cost of delay incident to appeal. Surely the prospect of additional interest on this sizeable judgment should be more than sufficient motivation for the State to proceed in a timely fashion with this appeal.

In addition, in assessing the need for a supersedeas bond the court cannot overlook principles of state sovereignty and federalism. *See Easter House* v. *State of Illinois Department of Children and Family Services*,

645 F. Supp. 107, 108 (N.D. Ill. 1986). Here, as in *Easter House*, this "federal court[] [would] . . . not [be] show[ing] respect for the dignity and interests of . . . [New York] [S]tate by requiring it to post a supersedeas bond where, . . . , [the] [tribal] plaintiff[s] seriously challenge[] neither the state's willingness nor its ability to satisfy an adverse judgment." *Id.* Likewise, the tribal plaintiffs have *not* shown that "the complexity of the State's collection process [nor] the amount of time required to collect on a judgment after it is affirmed on appeal[,]" *see Federal Deposit Insurance Corporation* v. *A & R Construction, Inc.*, 921 F. Supp. 153, 155 (citations omitted), somehow justify requiring the State to post a supersedeas bond.

Finally, the court cannot ignore the fact that not only would a bond need to be sufficient to cover the face value of the judgment, but, as Local Rule 67.1 requires, it would need to be for an additional 11% "to cover interest and any damage for delay as may be awarded, plus $250 to cover costs." *See* L.R. 67.1. Given that "it would be almost impossible to find a bonding agency willing and able to secure a judgment of this size[,]" and that "the potential costs to the State of posting a bond . . . would be prohibitively expensive[,]" *see* Stone Aff. at 3, ¶ 6, the posting of a supersedeas bond here would be "far from practicable." *See International Distribution Centers, Inc.* v. *Walsh Trucking Co., Inc.*, 62 B.R. 723, 732 (S.D.N.Y. 1986) (quoting *Federal Prescription Service* v. *American Pharmaceutical Association*, 636 F.2d 755, 760-61 (D.C. Cir. 1980)). Due to all of these "unusual circumstances," including the fact that the judgment debtor is the State of New York, and thus the tribal plaintiffs' interests as judgment creditors "would not be unduly endangered[]" even if the State is not

required to post a supersedeas bond, the court waives the requirement of posting such a bond in this case. *See Texaco*, 784 F.2d at 1155 (citation omitted).

IV. Substitution of Successor State Agencies

There is one final procedural matter pertaining to the judgment in this case, and that is the State's motion to substitute "the successor State agencies for the Stage agency defendants named in plaintiffs' complaints." *See* St. Supp. Memo. at 49. As detailed in the State's supporting memorandum of law, several of the State agencies named as defendants in the tribal plaintiffs' complaints are no longer in existence. *See id.* Likewise, because this litigation has spanned more than two decades, there have been changes in the individual public official defendants. There being no opposition to this substitution motion, and for the reasons set forth in the State's supporting memorandum, *see id.* at 49, in accordance with Fed. R. Civ. P. 25(d), the court hereby grants the court's motion to revise the caption with respect to the State defendants, in the manner reflected in exhibit D to attorney Roberts' affirmation of October 15, 2001.

V. Tribal Plaintiffs' "Conditional" Motion

In moving for a new trial pursuant to Fed. R. Civ. P. 59(a) and seeking an additional $1,749,963,279 in pre-judgment interest, the tribal plaintiffs emphasize that they are seeking such relief "only, *and in that event only*," if this court "grants a new trial or otherwise amends the judgment at the request of the State of New York or *any other party*[.]" *See* Amended Notice of Conditional Motion at 1 (emphasis added). Given the court's rulings herein, in combination with the terms in

which this "conditional" motion is couched, the court hereby denies the same as moot.

VI. Tribal Plaintiffs' Miscellaneous Motions

Taking issue with the court's 60% reduction of Dr. Berkman's prejudgment interest calculations, the tribal plaintiffs are seeking to have the court "amend its Phase II findings to adopt the Cayugas' expert's conclusions as to the amount of prejudgment interest[.]" Memorandum of Law In Support of Conditional Motion for a New Trial and Amendment of Findings and Judgment at 13. The court finds no merit to this argument and adheres to its prior rulings in this regard. Therefore, the court denies the tribal plaintiffs' motion to amend the judgment pursuant to Fed. R. Civ. P. 52(b) and 59(e).

Lastly the tribal plaintiffs are seeking to have this court "reconsider its pre-trial determination denying ejectment as a remedy." *Id.* at 14. The tribal plaintiffs reason that the court should revisit this issue because "[i]n weighing the equities of granting ejectment, the Court . . . emphasi[zed] . . . laches, which it attributed to the Cayugas in failing to commence this action earlier." *Id.* Further, the tribal plaintiffs reason, because the court has "now determined that no finding of laches against the Cayugas is warranted, [it] should reconsider its decision denying ejectment as a remedy." *Id.* There is no sound reason for revisiting the ejectment issue. Laches was only one of several factors which this court considered in deciding whether or not ejectment was a viable remedy in this case; it was not the determinative factor. *See Cayuga Indian Nation of New York* v. *Cuomo*, Nos. 80-CV-930, 80-CV-960, 1999 WL 509442 (N.D.N.Y. July 1, 1999). Moreover, because the issue of ejectment has been thoroughly litigated,

briefed and resolved, there is no valid reason for re-opening that contentious issue. Thus, the court hereby denies the tribal plaintiffs' motion to grant ejectment as a remedy.

Conclusion

After carefully considering the parties' numerous post-trial motions, for the reasons set forth herein the court hereby:

(1) DENIES without prejudice to renew the non-State defendants' motion to amend the judgment pursuant to Fed. R. Civ. P. 52(b);

(2) GRANTS the tribal plaintiffs' motion for certification pursuant to Fed. R. Civ. P. 54(b);

(3) GRANTS the plaintiff-intervener U.S.' motion to dismiss all defendants except the State of New York from its complaint in intervention;

(4) DENIES the tribal plaintiffs' motion for additional prejudgment interest;

(5) GRANTS the State' motion to amend the judgment to provide that it runs jointly in favor of the U.S., as trustee, and the tribal plaintiffs;

(6) DENIES without prejudice to renew the State's motion to amend the judgment to run exclusively in favor of the U.S.;

(7) DENIES the State's motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50;

(8) DENIES the State's motion for reconsideration seeking recalculation of the prejudgment interest;

(9) DENIES the State's motion for a new trial pursuant to Fed. R. Civ. P. 59(a);

(10) GRANTS the State's motion for a stay of execution of the judgment and to waive the posting of a supersedeas bond pursuant to Fed. R. Civ. P. 62(d);

(11) GRANTS that State's motion for substitution of the successor State agencies pursuant to Fed. R. Civ. P. 25(d);

(12) DENIES the tribal plaintiffs' "conditional" motion for a new trial pursuant to Fed. R. Civ. P. 59(a);

(13) DENIES the tribal plaintiffs' motion to amend the judgment pursuant to Fed. R. Civ. P. 52(b) and 59(e); and

(14) DENIES the tribal plaintiffs' motion for reconsideration of the court's prior determination denying ejectment as a remedy.

The Clerk of the Court is hereby directed to amend the October 2, 2001 judgment accordingly.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF NEW YORK

Nos. 80-CV-930, 80-CV-960

THE CAYUGA INDIAN NATION OF NEW YORK, ET AL.,
PLAINTIFFS

AND

THE SENECA-CAYUGA TRIBE OF OKLAHOMA, AND THE
UNITED STATES OF AMERICA, PLAINTIFF-INTERVENOR

v.

GEORGE E. PATAKI, AS GOVERNOR OF THE STATE OF
NEW YORK, ET. AL., DEFENDANTS

Oct. 2, 2001

MEMORANDUM-DECISION AND ORDER

MCCURN, Senior District Judge.

Table of Contents

Introduction ..... [271]

Background ..... [272]
I. Pre-Trial Motions ..... [272]
II. Jury Instructions ..... [273]
III. Verdict ..... [273]

Discussion ..... [275]
I. Verdict ..... [275]
II. Pre-Judgment Interest ..... [284]

A. Wickham Analysis ..... [285]
1. Full Compensation ..... [286]
2. Nature of Statute ..... [288]
3. "Other General Principles" ..... [291]
4. Fairness of Relative Equities ..... [293]
a. Burden of Proof ..... [297]

Historical Evidence ..... [300]
I. Pre-Revolutionary War ..... [304]
II. American Revolution ..... [305]
A. Wyoming Valley ..... [305]
B. Sullivan-Clinton Campaign ..... [306]
C. Articles of Confederation ..... [309]
D. Cayuga Factions ..... [309]
E. 1784 Fort Stanwix Treaties ..... [310]
F. Livingston Lease ..... [312]
G. 1789 Treaty at Albany ..... [314]
H. Nonintercourse Act ..... [321]
I. Richardson Lease ..... [322]
J. 1793 State Statute ..... [324]
1. Aftermath of the 1793 Statute ..... [327]
K. 1794 Federal Treaty of Canandaigua ..... [328]
L. New York State's 1795 Act and the Council of Revision ..... [330]
M. 1795 Treaty of Cayuga Ferry ..... [331]
1. State's Awareness of Nonintercourse Act ..... [332]
a. Pre-1975 Awareness ..... [332]
b. 1795 Awareness ..... [332]
2. Negotiation Process ..... [340]
3. Commissioners' Conflicts of Interests ..... [343]
4. Sale of Former Cayuga Lands ..... [346]
5. Adequacy of Consideration ..... [347]

N. 1807 Treaty ..... [351]
O. 1807 Onward ..... [353]
1. "Bad Faith" ..... [355]
2. Delay ..... [356]
Economic Evidence ..... [358]
Conclusion ..... [366]

Introduction

On January 18, 2000, the court commenced with jury selection in this historic land claim litigation. The court's resolution of the liability issues,[1] left only one issue for the jury's consideration—the amount of compensation, if any, to which the tribal plaintiffs, the Cayuga Indian Nation of New York and the Seneca-Cayuga Tribe of Oklahoma ("the Cayuga"),[2] were entitled for the loss of their tribal lands over two centu-

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[1] *See Cayuga Indian Nation of New York v. Cuomo*, 730 F. Supp. 485 (N.D.N.Y. 1990) ("*Cayuga IV*") (granting Cayuga's motion for partial summary judgment, and declaring that its 1795 and 1807 Treaties with the State were invalid under the Nonintercourse Act because the Federal Government never ratified those conveyances); *Cayuga Indian Nation of New York v. Cuomo*, 758 F. Supp. 107 (N.D.N.Y. 1991) (because the Cayuga obtained recognized title in the subject land through the 1794 Treaty of Canandaigua, defendants' abandonment defense was insufficient to defeat the Cayuga's claims to that land); and *Cayuga Indian Nation of New York v. Cuomo*, 771 F. Supp. 19 (N.D.N.Y. 1991) (defense of laches unavailable).

[2] Nearly two years after the commencement of this action, the United States of America ("the U.S.") intervened as a plaintiff in this action "on its own behalf and to enforce the restrictions on alienation found in 25 U.S.C. § 177 [the Nonintercourse Act]" for the tribal plaintiffs. *See* U.S. Complaint in Intervention at 2, ¶ 4. Hereinafter, the U.S. and the Cayuga plaintiffs will be collectively referred to as "plaintiffs," unless it is necessary to distinguish between the two.

ries ago. Nineteen days, six witnesses, whose testimony comprises the nearly 3,000 page trial transcript, and approximately 130 exhibits later, on February 17, 2000, the jury rendered its verdict. It found the State of New York ("the State")[3] liable to the Cayuga in the total amount of $36,911,672.62. Those damages were divided into two categories: (1) $1,911,672.62 for the fair rental value of the Cayuga's former homeland for 204 years; and (2) an additional $35,000,000.00 in damages for future loss use and possession of that same land.

Background

No less than twenty years of litigation preceded that jury verdict. Assuming familiarity with the protracted and at times convoluted history of this action, the court will not repeat that entire history herein. To place the issue of prejudgment interest which now dominates this litigation in context, however, an overview of some of this court's rulings in recent years, especially as to remedies, is in order.

I. Pre-Trial Motions

Faced with several motions *in limine* seeking to "severely limit the remedies available to the Cayugas[,]" in *Cayuga Indian Nation of New York v. Pataki*, No. 80-CV-930, 80-CV-960, 1999 WL 224615, at *1 (N.D.N.Y.

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[3] To avoid "a morass of complicated and lengthy litigation which could easily extend well into the next century[,]" if the court allowed the Cayuga to proceed against all of the defendants, including the approximately 7,000 individual landowners, it granted the U.S.' motion "to proceed to trial first against the State[.]" *See Cayuga Indian Nation of New York v. Pataki*, 79 F. Supp. 2d 66, 76 (N.D.N.Y. 1999) ("*Cayuga XI*"). Hence, the State was the lone defendant in the jury trial or what has come to be known as "Phase I" of this litigation, and it continued to be the only defendant in "Phase II" of this litigation, the non-jury trial.

April 15, 1999) ("*Cayuga VIII*"), the issue of prejudgment interest first arose. Holding that federal rather than state law governs the issue of the availability of prejudgment interest, this court recognized its "*sweeping discretion* to decide whether to award prejudgment interest . . . , as well as [its] *considerable latitude* in establishing both the rate of interest and the accrual date." *Id.* at *17 (emphasis added). Ultimately, the court declined to decide whether the Cayuga were entitled to recover prejudgment interest because at that time the record was not sufficiently developed.

The court also was operating in a "legal vacuum" because the parties had not addressed the factors which the Second Circuit in *Wickham Contracting v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 955 F.2d 831 (2d Cir. 1992), had identified as relevant in deciding "whether to award prejudgment interest[.]" *See id.* at *19 and *21. After reciting the *Wickham* factors, the court stressed that an award of prejudgment interest was *not* a foregone conclusion. *Id.* at *16.

With a date for jury selection looming, the parties sought further clarification on a variety of issues including, yet again, prejudgment interest. The court held that it would not receive proof of present day value during Phase I. In a final round of motions *in limine* made in anticipation of Phase I, the U.S. sought, *inter alia*, to have the court "reserv[e] to [itself] all issues of law and equity, leaving only fact issues as to the amount of damages for the jury[.]" *Cayuga Indian Nation of New York v. Pataki*, 79 F. Supp. 2d 78, 86 (N.D.N.Y. 1999) ("*Cayuga XII*"). Adopting this approach, the court held that equitable issues such as laches would "be reserved to [it], and if necessary, the same may be the subject of post-trial motions and/or

additional post-trial proceedings before the court, without a jury." *Id.* at 92.

II. Jury Instructions

At various points during Phase I the court instructed the jury in conformity with the pre-trial rulings outlined above. Among other things, in its preliminary instructions the court briefly explained the respective roles of the jury and the court, *i.e.*, the court decides legal issues and the jury decides fact issues. Consistent with those different roles, the court further explained that the trial would occur in two phases. In Phase I the jury's task was to resolve the issue of the amount of damages, if any, to which the Cayuga would be entitled. The court then explained that there would be another proceeding after the jury trial where the Court would resolve certain equitable issues, such as interest.

At the close of the proof the court reiterated these points, explaining that "interest on the amount of any damages you may award, conversion to present day value of any past damages you may award," and "a possible reduction in any damages you may award to the plaintiffs due to their alleged failure to timely commence this action, that is, laches[,]" are all equitable issues outside the province of the jury. *See* Transcript ("Tr.") at 2748-49. Thus, the jury was unequivocally advised, not once, but twice that it should not concern itself with equitable issues such as interest. Consistent with the foregoing, the jury was explicitly instructed that it "should [not] . . . calculate an amount to compensate the plaintiffs for the fact that they did not have the use of the money between when the injury occurred and the present." *Id.* at 2773-74. That particular charge concluded by advising the jury: "It has previously been decided that the Court will determine

whether an award of same will or will not be made in connection with the amount you determine as damages." *Id.* at 2774. The jury was further instructed that it "*should not make any adjustment for* the effect of *inflation or* the *loss* of *use* of the *money*." *Id.* at 2773 (emphasis added). Presupposing that it would award damages in dollars for the year the injury was sustained, the jury also was instructed that it "should not, . . . attempt to convert the value of the dollar at the time of the injury for which you have determined damages to an equivalent value in current dollars[.]" *Id.* Further, insofar as calculating lost rent, the jury was instructed, "you must determine . . . the loss of the value of the use of the lands of the Cayugas for each of the 204 years they were wrongfully detained or prevented from the use of the land." *Id.* at 2768-69.

III. Verdict

The verdict form was fairly lengthy, but the jury only had to answer two discrete questions. The first was:

> What amounts, if any, do you find that plaintiffs have been damaged for loss of use and possession of the claim area from July 27, 1795 to date as measured by a fair rental value without improvements but with infrastructure in place, less credit, if any, to the State for payments made to plaintiffs?

Gov. exh. 21 at 1, ¶ 1 (footnote omitted). The verdict form also required the jury to indicate for each year from July 27, 1795, through "2000 to date," the following: the "amount" of such loss; the "credit to the State[;]" and the "net amount." *See id.* at 1. For the first designated time period, from July 27, 1795 to the end of that year, the jury found that the Cayuga had sustained losses in the amount of $7,148.69. *See id.* For

every full year thereafter through 1999, the jury found that the Cayuga had sustained losses in the amount of $17,156.86 per year. For the year 2000, to the verdict date, February 17, 2000, the jury found that the Cayuga had sustained losses in the amount of $2,859.48. *See id.* at 10.

In accordance with a stipulation between the Cayuga and the State, the jury then credited the State for its annuity payments to the Cayuga for the years 1795 through 1999. After finding total rental losses in the amount of $3,510,007.61, and payments by the State totaling $1,598, 334.99, the jury concluded that the Cayuga were entitled to $1,911,672.62 for the fair rent value of the claim area over the 204 years. *See id.*

After polling the jury, the court advised the parties that it would not enter a final judgment at that time because of the outstanding issues which needed to be resolved in Phase II. The parties were given the opportunity within sixty days of the verdict to file any motions in relation thereto, but no such motions were filed.

Anticipating Phase II, among other things, the parties filed their respective economists' reports. On May 17, 2000, after reviewing the same, those reports revealed an "enormous disparity[ ]" as to the amount of prejudgment interest to which the Cayuga may be entitled, and the court was forced "to conclude that it [could not] properly assess the availability of prejudgment interest in the first instance without some context, beyond the mathematical calculations found in th[ose] . . . reports." *Cayuga Indian Nation of New York v. Pataki*, Nos. 80-CV-930, 80-CV-960, 2000 WL 654963, at *3 (N.D.N.Y. May 17, 2000), *amended on other grounds*, 2000 WL 687901 (N.D.N.Y. May 22,

2000). Therefore, the court agreed to allow the parties' witnesses to testify as to certain "equitable factors[.]" *See id.* The court went on to list several such factors, but it did not mention allowing any witness to testify as to what the jury actually intended when it rendered its verdict. In the end though, the court was extremely generous in terms of the proof which it permitted during Phase II, reasoning:

> Because the stakes are simply too high, the experts' views too antithetical, and the equities on all sides too important to disregard, . . . the only way to proceed at this juncture is to make every effort to insure that all parties to this litigation have an equal opportunity to present their respective versions of history, and how those versions impact the remaining issues of prejudgment interest and laches.

Id. at *4.

The Phase II trial was lengthy and the court's task in analyzing the extensive proof adduced therein was an arduous one, to say the least. Under the best of circumstances analysis of the Phase II proof would have been difficult. But the court's task was unnecessarily complicated by the fact that *all* of the parties frequently either cited to a document which did not support their contention, or equally disconcerting, would take a quote out of context. All too often this selective quoting meant that when the court consulted a source document or the transcript, the assertion was not actually supported therein.[4] Moreover, when the court read

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[4] The parties are equally guilty of this practice. To give but a few examples, the U.S. declares that "[t]he Cayuga minority protested the treaty vehemently, and again accused New York of having defrauded them at the Treaty of Albany in 1789." United

such a quote in context the meaning was often times very different than that ascribed to it by the quoting party. The court is fully aware that lawyers have an obligation to represent their clients "zealously[,]" *see* N.Y. code of Professional Responsibility Canon 7, reprinted in N.Y. JUD. LAW APP. (McKinney Supp. 2001); but there are limits to such zealousness and a lawyer does not do his or her client any great service by engaging in such tactics which distract from a party's otherwise valid legal arguments and undermine a lawyer's credibility to a certain extent.

States' Revised Post-Trial Memorandum of Law ("U.S.Post- Tr. Memo.") at 26. It then cites page 2995 of Dr. Whiteley's testimony to support that assertion. Support for the U.S.' proposition cannot be found anywhere on that page however. In another example, the State compounded its misstatement by inaccurately stating the opposition's position. The State asserts that according to the Cayuga "[*b]oth* the 1789 and 1795 treaties, . . ., were negotiated in bad faith because they were not conducted with the full council of chiefs of the Iroquois confederacy." State of New York Defendants' Phase II Post-Hearing Reply Memorandum ("St.Reply") at 10 (emphasis added). The State then goes on to cite to the Cayuga's and U.S.' memorandum respectively. When those cites are consulted, however, they pertain only to the 1789 Treaty and not to the 1795 Treaty.

Equally troubling, and adding to the court's burden, was the parties' tendency to at times cite to an entire exhibit without referring to a page number. This practice is bothersome enough when the documents are relatively short, such as when the State cited to four speeches from the 1795 Treaty negotiations without including specific references, *see* State of New York Defendants' Phase II Hearing Memorandum ("St.Pre- Tr.Memo.") at 10; but when the cite is to a voluminous exhibit such as the two volume "Proceedings of the Commissioners of Indian Affairs," compiled by historian, Franklin Hough, this practice is inexcusable. *See* St. exh. 35.

Discussion

The issues the parties raise in connection with Phase II are legion. The first and in some ways perhaps most important issue pertains to the meaning of the jury verdict itself.

I. Verdict

More than four months *after* the jury rendered its verdict and more than four months *after* the jury's discharge, the State raised for the first time the possibility of an inconsistent verdict. In its June 30, 2000, memorandum of law submitted prior to Phase II the State did not employ the phrase "inconsistent verdict." Its economist Richard S. Grossman did not shy away from that concept in his report, unequivocally stating that the "verdict presents the Court with an inconsistency[.]" *See* St. exh. 721 at 10, ¶ 26. In the State's view this alleged inconsistency arises because in Phase I the jury, colloquially speaking, impermissibly compared apples and oranges. *See* Pre-Tr. Memo at 74.

This supposedly impermissible comparison occurred, Grossman believes, because the jury did not distinguish between current and constant dollars as he defines and employs those terms. In Grossman's report he wrote that from an economic standpoint there are "two types of dollars: 'current dollars,' which are merely the dollars of a particular year *in that year*, and 'constant dollars,' which are sums that are expressed in the dollars of one particular year (called the base year)." St. exh. 721 at 7, ¶ 18 (emphasis in original). When "compar[ing] quantities of dollars from different years," Grossman declared that "[i]t is not possible to make an *economically* meaningful comparison between sums denominated in dollars of different years." *Id.* at 8, ¶ 20 (emphasis added).

Grossman therefore asserted "it makes *no economic sense* to add or to subtract sums denominated in dollars of different years[;]" yet that is precisely what the jury did Grossman concludes. *Id.* (emphasis added). Such calculations are in Grossman's view "completely unacceptable from an economic perspective[.]" *Id.* That type of calculation is "troublesome" suggests Grossman because, for example, when subtracting 1999 and year 2000 dollars, those dollars "differ in value by 3 percent[.]" *Id.* Accordingly, a meaningful comparison of dollars in different years can only be had, Grossman contends, when those dollars are "denominated in the constant dollars of any given year." *See id.*

Grossman posits that the jury disregarded these general economic precepts by crediting the State with payments to the Cayuga through the years in "current dollars," while at the same time using "constant dollars," as he defines that term, in determining the amount of lost rent in any given year. *See id.* at 9, ¶¶ 22 and 23. To support his theory as to how the jury calculated lost rent damages, Grossman made two assumptions. First, because "the 'credit to state' column . . . corresponds exactly to the amounts actually paid by the [State] to the plaintiffs in each year of the 204-year period[,]" Grossman believes that "the figures stated in this column are clearly expressed in the dollars of the years in which they were paid, i.e., current dollars." *Id.* at ¶ 22.

Second, in determining the amount due the Cayuga each year for lost rent, Grossman hypothesizes that the jury used "constant" year 2000 dollars. To support this hypothesis, Grossman observes that the jury "award-[ed] [a total of] $3.5 million divided up into 204 equal payments (since $3.5 million divided by 204 equals

$17,156.86 exactly)." *Id.* at ¶ 23. Further, Grossman observes that the $3.5 million in lost rent damages, as found by the jury is (not coincidentally in Grossman's view), equivalent to exactly ten percent of the $35 million which the jury awarded the Cayuga for future loss of use and possession of the claim area. Given what Grossman deems to be this obvious correlation between the total rental value damages and the current fair market value of the land, and the fact that rents are identical in each year from 1795 to 2000, he concludes that "it is . . . clear that the jury expressed the lost rents in current dollars." *Id.*

Grossman also relies upon the court's instruction to the jury not to adjust the award or "attempt to convert the value of a dollar at the time of the injury[]" *see* Tr. at 2773, to support his conclusion "that the jury's verdict in the 'amount' column is expressed in dollars of the year 2000." *See* St. exh. 721 at 9, ¶ 23. Additionally, Grossman opines that the dollars in the "amount" column cannot be expressed in current dollars because prices have not stayed constant over the past 204 years. *See id.* at 9, ¶ 24. Finally, Grossman believes in part that because the jury was instructed not to make adjustments for inflation, it "gave its verdict in the dollars it . . . knows best: constant 2000 dollars."

In light of the foregoing, instead of accepting the verdict on its face, the State maintains that the court should "adjust[]" the verdict "by either converting the annual rent to historical damages for each year *or* by converting the State payments to present-day dollars." State Defendants' Memorandum of Law in Support of their Request to Examine the Economic Witnesses on the Jury's Award for Fair Market Rental Value of the Claim Area at 2 (emphasis added); *see also* St. Post-Tr.

Memo. at 70. The State argues that adjusting the jury verdict in this way is entirely proper because where, as the State believes occurred here, "the verdict is not clear on its face, it is appropriate to look at how the verdict was constructed[.]" Tr. at 6116. Once the court makes such an adjustment or conversion, the State wants the court to recalculate the jury verdict using those adjusted figures. The State contends that this process, as opposed to the process outlined by Grossman, which the State suspects the jury employed, will "yield a meaningful total net rental figure" from which the court can then compute prejudgment interest. *See id.*

In contrast to the State's approach, which requires interpreting the jury verdict, both the Cayuga's and the U.S.' respective economists, while arriving at different conclusions as to the amount of prejudgment interest, accept the verdict "at face value." *See* Cayugas' Post-Trial Memorandum ("Cay. Post-Tr. Memo.") at 22. Dr. Berkman, the U.S.' economist, acknowledged that his calculations were based upon "the numbers presented on the jury verdict form[.]" *See* Tr. at 6053-54. The Cayuga's economist, Dr. Temin, similarly testified that in terms of yearly rent payments, he "started from the jury verdict form[.]" *See id.* at 5809. Thus Drs. Temin and Berkman assumed, in conformity with the charge, that the jury expressed *both* the State's credit payments and the fair rental value "in *dollars* of the *particular year* in which they were incurred." U.S. Post-Tr. Memo. at 60 (emphasis added). Any other reading of the verdict amounts to improper "second-guessing" of the jury's intent, according to the Cayuga. *See* Cay. Post-Trial Memo. at 20. Finally, characterizing Grossman's suggested "adjustments" to the verdict as "tam-

pering" with the same, the Cayuga are taking the position that there is no need, and indeed it would be improper for the court to make the adjustments which the State is urging because such adjustments would "lead[] to a complete nullification of the jury's award[.]" Cayugas' Post-Trial Reply Memorandum ("Cay. Reply") at 8 (citations omitted); *see also* U.S. Post-Trial Memo. at 65.

Given these conflicting views as to the meaning of the jury verdict, the first issue which this court must consider is whether it is proper, in hindsight, to reexamine the verdict in an effort to ascertain how the jury arrived at the final damage figure for 204 years of lost rent. More specifically, in calculating prejudgment interest, should the court, as the State urges, "adjust" the dollar amounts as found by the jury, or should it simply make any prejudgment interest calculation it deems proper using the dollar figure, unadjusted, found on the verdict form.[5]

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[5] Somewhat surprisingly, the Cayuga are not questioning the timing of the State's argument that the verdict is inconsistent. If the court ultimately agrees with the State, finding that the verdict is inconsistent, the ramifications are tremendous, including the possibility of a retrial. In terms of both judicial economy and upholding the sanctity of jury verdicts generally, retrials are disfavored. That is especially so in a case of this magnitude where the trial was relatively lengthy and hard-fought. *See Grant v. Westinghouse Elec. Corp.*, 877 F. Supp. 806, 815 (E.D.N.Y. 1995). Given the enormity of the task which a retrial would involve here, and given the fact that the State did not even hint at the possibility of an inconsistent verdict until four months after the discharge of the jury, the court cannot ignore the timing of the State's argument in this regard.

Generally "if trial counsel fails to object to any asserted inconsistencies and does not move for resubmission of the inconsistent

verdict *before* the jury is discharged, the party's right to seek a new trial is waived." *James v. Tilghman*, 194 F.R.D. 408, 413 (D. Conn. 1999) (quoting *Manes v. Metro-North Commuter R.R.*, 801 F. Supp. 954, 959 (D. Conn. 1992), *aff'd without published opinion*, 990 F.2d 622 (2d Cir. 1993)) (emphasis added by *Manes* court). The purpose of waiver is easy to see; it "promote[s] the efficiency of trials by allowing the original deliberating body to reconcile inconsistencies without the need for a new presentation of evidence to a different body." *Wright v. Wilburn*, 194 F.R.D. 54, 59 (N.D.N.Y. 2000) (internal quotation marks and citations omitted). Otherwise, especially where counsel is fully aware of the claimed inconsistency when the jury renders its verdict, the jury's work-product is "unfairly scuttled[.]" *In re Wedtech Corp.*, 196 B.R. 274, 278 (Bankr. S.D.N.Y. 1996) (internal quotation marks and citations omitted).

Instead of taking a hard-line approach to waiver, the Second Circuit in *Denny v. Ford Motor Co.*, 42 F.3d 106, 111 (2d Cir. 1994), adopted a "case-by-case" approach to evaluating whether a party has waived its right to challenge a verdict as inconsistent. While the Second Circuit does "take a guarded approach to the *per se* application of the waiver rule, acknowledging that a party's failure to make a timely objection carries some weight in [a] court's analysis of the waiver issue[,]" at the same time it recognizes "that a court may not completely abdicate its responsibility to resolve inconsistencies in jury verdicts." *Tilghman*, 194 F.R.D. at 413 (internal quotation marks and citations omitted); *see also Trinidad v. American Airlines, Inc.*, No. 93 Civ. 4430 SAS, 1997 WL 79819, at *2 (S.D.N.Y. Feb. 25, 1997) ("[A]lthough this Circuit has rejected a *per se* waiver rule, waiver can and should be applied in appropriate cases.")

Adopting a "contextual approach" to waiver, *see Manes*, 801 F. Supp. at 959, the Second Circuit in *Lavoie v. Pacific Press & Shear Co.*, 975 F.2d 48 (2d Cir. 1992), found that the defendant manufacturer waived its challenge to the jury verdict as inconsistent where it made that challenge for the first time in a post-trial motion, and where it failed to raise that inconsistency before the jury's discharge. *Id.* at 54. In a similar vein, in *Tilghman*, 194 F.R.D. at 412, the court deemed the plaintiff to have waived his argument that the verdict form's answers were inconsistent where he did not

object to that form after the verdict. *See id.* at 413. Nor did that plaintiff ask for reconsideration of the jury's verdict, or move for a new trial on that basis. *See id.; see also Castle v. Leach Co.*, 4 F. Supp. 2d 128, 130 (N.D.N.Y. 1998) (in products liability and negligence case, plaintiff waived right to seek a new trial based upon an asserted inconsistent verdict where she did not object to the verdict sheet at the charge conference, nor to the jury's answers; and she did not move for resubmission to the jury to resolve the alleged inconsistency); *Blissett v. P.K. Deputy Eisensmidt, D.S.S.*, 940 F. Supp. 449 (N.D.N.Y. 1996) (McCurn, J.) (defendant correction officers waived right to object to verdict as inconsistent based upon a finding of a constitutional violation, but no finding of battery, where despite several opportunities, they failed to object to the same before the jury's discharge). By the same token, however, in *Denny* itself the Second Circuit held that the defendant manufacturer did *not* waive its objection to submitting to the jury the issues of strict products liability and breach of implied warranty where the defendant had timely objected to such submission in that it was made before the jury was instructed on the claims, arguing that it could lead to inconsistent results. *See* 42 F.3d at 111. The Second Circuit also noted that resubmission to the jury would have amounted to no more than renewal of the party's earlier objection. *See id.* Thus, in essence, whether or not a party is deemed to have waived its right to object to a verdict as inconsistent depends largely upon the timing of that objection.

In accordance with the waiver principles developed within this Circuit, here, in all likelihood, the State *did* waive its right to object to the jury's verdict as inconsistent. First of all, the State did not raise the specter of an inconsistent verdict prior to the jury's discharge, thus preventing the court from resubmitting the case to the jury for further deliberations to clarify and/or perhaps correct this perceived inconsistency. The State also did not object to the jury's answers immediately after it the verdict, even though the jurors were individually polled, giving the State additional time in which to contemplate the jury's verdict. Due to the State's silence, the court was never made aware of this claimed inconsistency prior to discharging the panel.

The jury has long since been discharged and along with that the possibility of reconciling the jury's verdict has also disappeared.

To support its argument that the court should "look behind" the jury verdict, the State relies heavily upon *Sharkey v. Lasmo (AUL Ltd.)*, 214 F.3d 371 (2d Cir. 2000). According to the State, *Sharkey* stands for the proposition "that where the verdict is not clear on its face, it is appropriate to look at how the verdict was constructed[.]" Tr. at 6116. It is also "appropriate" under *Sharkey*, argues the State, for the court to consider evidence regarding the jury's intent in rendering its verdict. *See id.* at 6117.

Furthermore, if this alleged inconsistency is as readily transparent as the State seems to believe, it is difficult to imagine why the State did not immediately notify the court of same and seek to have the verdict resubmitted to that jury which had attentively sat through several weeks of often tedious testimony. *See Trinidad*, 1997 WL 79819, at *2 ("[I]f the alleged inconsistency is as blatant as plaintiff suggests, plaintiff cannot ... claim that the inconsistency was unnoticeable at the time of the verdict and therefore that plaintiff was justified in his delay."). In short, the State had a number of opportunities to object to the jury verdict form, as well as the instructions, on the basis that possibly an inconsistent verdict would result: (1) during the charge conference, which commenced on a Thursday, and continued over to the following Monday, giving the State ample time to study the proposed verdict form and the charge with an eye toward possible inconsistencies; (2) after the court's instructions, but before the jury began deliberations; (3) and again after the jury returned its verdict. The State was silent at each of those critical junctures. In fact, the court ventures to say that this alleged inconsistency did not become evident to the State except with the advantage of hindsight when its retained economist analyzed the verdict and the process which the jury supposedly undertook in arriving at same. Having said all that, the court need not definitively hold that the State has waived its right to object to the verdict as inconsistent because, for the reasons set forth above, the court is not persuaded that an inconsistency exists here. Consequently, there is no danger in the present case of the court abdicating its responsibilities to reconcile a claimed inconsistent verdict.

In *Sharkey*, a case brought pursuant to the Age Discrimination in Employment Act ("ADEA"), the plaintiff argued "that because he did not include lost pension benefits in his calculations of damages . . . or attempt to quantify his lost benefits . . . , the jury must not have included them it its award[;]" hence the district court erred in denying an award of prejudgment interest and pension benefits. *Sharkey*, 214 F.3d at 375. The defendant countered that because the evidence included references to pension benefits offered to plaintiff's colleagues, when the jury awarded plaintiff "damages for [his] *total* financial losses[,]" it included the value of his lost pension benefits in the verdict. *See id.* (emphasis in original) (internal quotation marks omitted). The defendant also pointed to the fact that the jury had been instructed that plaintiff was entitled to recover his "economic loss[;]" and that he "was entitled to recover lost salary and benefits, including . . . fringe benefits." *Id.* Finally, the defendant noted that the jury was also instructed that it "may award [plaintiff] an amount equal to the salary and benefits he would have received . . . less the amount of salary and benefits he received after he left the employ of the defendants, including severance payments, *pension benefits* and amounts from other employers . . . ." *Id.* (emphasis in original) (internal quotation marks omitted).

Given the ambiguous state of the record as to whether the jury included the value of lost pension benefits in its verdict for "'total financial losses[,]'" the Second Circuit concluded that it was impossible to definitively say whether the jury included the value of such benefits in making its award. *See id.* Therefore, the Court instructed the district court on remand to

"make a determination whether the jury's award included the value of lost pension benefits." *Id.*

On remand the Second Circuit also instructed the district court "to apportion the jury's award[]" to determine what part was attributable "to stock rights and options and the value of lost pension benefits[.]" *Id.* Such apportionment was necessary according to the Second Circuit because an award of "prejudgment interest may be inappropriate on the portion attributable to the value of lost pension benefits, if any." *Id.*

Sharkey does not mandate the conclusion that this court should, after-the-fact, in effect rewrite the jury verdict here. There is a fundamental distinction between *Sharkey* and the present case—a distinction which the State conveniently disregards. In *Sharkey* the district court's task on remand was to ascertain the scope of the jury's award and to apportion it. Here, the State is asking the court to engage in a far different task—a task which would, as will be seen, result in usurping the jury's function. In the present case it is not simply a matter, as it was in *Sharkey*, of ascertaining the scope of the jury's award and then apportioning it. Rather, analyzing the verdict in the manner which the State is advocating would require this court to examine the Phase I evidence in its entirety, as well as the jury instructions, and then speculate as to how the jury derived damages for fair rental value. The analysis which the State proffers through Grossman would also require the court to improperly assume that the jury disregarded the court's instructions. Plainly such an analysis goes far beyond any contemplated by the *Sharkey* Court.

Of equal if not more import is that in *Sharkey* the possibility of an inconsistent verdict was never raised;

but the State is raising that possibility now. Therefore, this court's obligations differ significantly from those of the district court in *Sharkey*. Because the State is claiming that the verdict is potentially inconsistent, this court has an obligation to harmonize the verdict where possible—an obligation which did not arise in *Sharkey*. In short, given the obvious differences between *Sharkey* and the present case, the court declines to rely upon the latter as justification for, as the State insists, ascertaining "how the verdict was constructed[.]" *See* Tr. at 6116.

In addition to *Sharkey*, to support its assertion that the court should scrutinize this verdict and adjust it in the manner which Dr. Grossman is urging, the State cites to *Malarkey v. Texaco, Inc.*, 983 F.2d 1204 (2d Cir. 1993). Claiming that the district court's award of equitable relief, in the form of ordering plaintiff's promotion upon her reinstatement, "went far beyond making [her] whole, as mandated by the ADEA[,]" on appeal the defendant employer sought, *inter alia*, to set aside that relief for an abuse of discretion. *See id.* at 1214. The Second Circuit in *Malarkey* did observe that the district court had "*surmised* [that] the jury awarded plaintiff $65,000 by comparing her salary to that of . . . [another employee who was given the secretarial position to which plaintiff claim[ed] she was entitled]." *Id.* (emphasis added).

Relying upon the just quoted language from *Malarkey*, the State urges this court to "surmise" that the jury calculated its award in the manner which Dr. Grossman posits. The court will not do that because *Malarkey* presents an entirely different situation than does the present case. In exercising its "broad" discretion to fashion relief under the ADEA by ordering

plaintiff's promotion, the district court in *Malarkey* was drawing what the Second Circuit implicitly found to be a "logical extension" of the jury's award "express . . . findings[.]" *See id.* In sharp contrast with what the State is asking this court to do, the district court in *Malarkey* did not adjust or rewrite the jury's factual findings; nor did it supplant those jury findings with its own—both of which would happen if this court were to adopt the State's argument. Analyzing the verdict as the State's economist suggests would require more than a "logical extension" of the jury's verdict. It would require this court to completely transform the Phase I verdict, so much so that it would result in substantially altering if not completely reversing that verdict. Clearly, such a readjustment of the jury's factual findings is not what the Second Circuit had in mind in *Malarkey* when it implicitly approved of the fact that the district court had surmised how the jury arrived at a back pay award. Because *Malarkey* is readily distinguishable from the present case, it does not advance the State's argument in any way. Accordingly, *Malarkey* does not, as the State contends, support this court reexamining and ultimately readjusting the jury's verdict as to fair rental value. In sum, the State has not brought to the court's attention any legal authority to support its argument that the court should essentially rewrite the jury's findings as to lost rent damages.

This omission by the State is all the more glaring given the plethora of case law set forth below pertaining to the sanctity of a jury's verdict and a court's duty to reconcile a purportedly inconsistent verdict. Typically that case law centers on situations where courts are confronted with potentially inconsistent verdicts in the context of either a motion for a new trial

or a motion for judgment as a matter of law. Although the State is *not* seeking a new trial, those cases are instructive at this juncture nonetheless, particularly in the absence of any case law directly on point.

In this Circuit "'[w]hen confronted with a potentially inconsistent jury verdict, the court must 'adopt a view of the case, if there is one, that resolves any seeming inconsistency.'" *Densberger v. United Technologies Corporation*, 125 F. Supp. 2d 585, 598 (D. Conn. 2000) (quoting *Turley v. Police Dep't of the City of N.Y.*, 167 F.3d 757, 760 (2d Cir. 1999)) (other citation omitted). Thus "'[b]efore a court may set aside a special verdict as inconsistent and remand the case for a new trial, it must make every attempt 'to reconcile the jury's findings, by exegesis if necessary.'" *Id.* (quoting *Turley*, 167 F.3d at 760) (other citations omitted). "'[A]nd[,] if there is any way to view a case that makes the jury's answers to the special verdict form consistent with one another, the court must resolve the answers that way even if the interpretation is strained.'" *Wright*, 194 F.R.D. at 57 (quoting *McGuire v. Russell Miller, Inc.*, 1 F.3d 1306, 1311 (2d Cir. 1993)) (other citation omitted). The mere fact that a trial court may disagree with a jury's verdict does not provide a basis for granting a motion for a new trial based upon an alleged inconsistent verdict. *See Wright*, 194 F.R.D. at 57 (citing *Saloomey v. Jeppesen & Co.*, 707 F.2d 671, 679 (2d Cir. 1983)).

In assessing whether a given verdict is inconsistent, a court is not limited to examining "'just the [jury] answers themselves.'" *See Densberger*, 125 F. Supp. 2d at 598 (quoting *McGuire*, 1 F.3d at 1311) (citations omitted). The court "'should refer to the entire case[,]'" *see id.*, including jury instructions. *See Finne-*

gan v. Fountain, 915 F.2d 817, 820 n.3 (2d Cir. 1990) (citing *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 118-22, 83 S. Ct. 659, 9 L. Ed. 2d 618 (1963)). "This duty 'derives from the Seventh Amendment's obligation on courts not to recast factual findings of a jury, . . . , and is based on the notion that 'juries are not bound by what seems inescapable logic to judges.'" *Densberger*, 125 F. Supp. 2d at 598 (quoting *Indu Craft*, 47 F.3d at 497) (other citations omitted).

In attempting to reconcile a seemingly inconsistent verdict, the Second Circuit has held that "[w]here 'the district court properly instructed the jury . . . , [t]here is a strong presumption that the jury in reaching its verdict complied with those instructions.'" *Id.* Given that "strong presumption," the Second Circuit has held that "[a] jury's verdict reached after proper instructions must be upheld where there is a reasonable explanation for the jury's seemingly inconsistent answers." *Bonner v. Guccione*, 178 F.3d 581, 588 (2d Cir. 1999) (internal quotation marks and citation omitted). In fact, the Second Circuit has expressly stated that "[g]iven correct instruction on the law and no clear disregard for that instruction on the face of the verdict, a jury verdict must remain immune from questioning by the district court." *Id.* at 588 (internal quotation marks and citations omitted). As the foregoing principles show, the Second Circuit "has been aggressive in [its] efforts to harmonize inconsistent jury verdicts." Shaun P. Martin, *Rationalizing the Irrational: The Treatment of Untenable Federal Civil Jury Verdicts*, 28 Creighton L.R. 683, 717 (1995).

It is fundamental that "'[w]hen a jury returns a verdict by means of answers to special interrogatories [under Rule 49(a)], the findings must be consistent with

one another, as they form the basis for the ultimate resolution of the action.'" *Densberger*, 125 F. Supp. 2d at 598 (quoting *Crockett v. Long Island R.R.*, 65 F.3d 274, 278 (2d Cir. 1995)). Furthermore, "where the special verdict answers appear to be inconsistent but there is a 'view of the case that makes the jury's answer[s] . . . consistent, they must be resolved that way.'" *Tolbert v. Queens College*, 242 F.3d 58, 74 (2d Cir. 2001) (quoting *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364, 82 S. Ct. 780, 7 L. Ed. 2d 798 (1962)). Here, because the jury was asked to make certain, specific factual findings as to the amount of damages, and because it was not asked to determine liability, this is a "special" verdict under Fed. R. Civ. P. 49(a). The present verdict further conforms with a Rule 49(a) verdict in that it "did not offer the jury the ultimate choice normally called for by a general verdict—the defendant is liable to the plaintiff for a specified amount of damages, or the defendant is not liable to the plaintiff." *See Bradway v. Gonzales*, 26 F.3d 313, 317 (2d Cir. 1994) (internal quotation marks and citation omitted). Consequently, in analyzing whether or not this verdict is inconsistent, the court will treat the same as a "special verdict" in accordance with Rule 49(a).

The State, through its economist Grossman, is claiming that the verdict is inconsistent because purportedly when calculating fair rental damages, the jury uniformly employed year 2000 dollars in determining the yearly lost rent, but from those amounts it subtracted dollars in the year in which the State made payments. It is conceivable that the jury did in effect, as the State maintains, subtract apples from oranges. It is "equally rational to believe," however, that the jury did *not*

engage in such a comparison. *See Indu Craft*, 47 F.3d at 497. In fact, keeping with its "'duty . . . to attempt to harmonize the jury's answers, if it is at all possible under a fair reading of the responses[,]'" the court has little difficulty finding that this verdict is *not* inconsistent. *See Densberger*, 125 F. Supp. 2d at 598 (internal quotation marks and citation omitted).

Examining both the verdict form and the relevant jury instructions, as the court must, *see Finnegan*, 915 F.2d at 820 n.3 (citation omitted), it can be readily determined that the jury found the amount of lost rent using dollars in the years in which that rent was lost—not as the State urges in year 2000 dollars. Any other reading of the verdict would require the court to assume that the jury disregarded the court's explicit instruction that it "should not, . . . attempt to convert the value of the dollar at the time of the injury for which you have determined damages to an equivalent value in *current* dollars[.]" Tr. At 2773 (emphasis added). In other words the jury was instructed, albeit implicitly, to award fair rent damages for each of the 204 years in the year those damages were sustained and *not* to convert the same to an equivalent value in year 2000 dollars—the year of the verdict.

Because "there is no indication to the contrary, it must be assumed that the jury followed [that] instruction[][.]" *See Gierlinger v. Gleason*, 160 F.3d 858, 875 (2d Cir. 1998) (internal quotation marks and citation omitted). By following the instruction not to convert, it is obvious that the jury found the amount due for lost rent in each of the 204 years in the dollars of those particular years. There is no dispute that the jury then subtracted dollars of each particular year in which the State made payments to the Cayuga. *See, e.g.*, U.S.

Post-Trial Memo. At 70; and Tr. At 6357. Thus, the jury *did* subtract like dollars. Consequently, there *is* a plausible explanation for the jury's answers regarding lost rent which eliminates the State's claimed inconsistency for that aspect of the jury's award.

The confusion here arises over the definition of "current." Grossman's definition of "current" is different than the meaning which the court, the lawyers and the jury attributed to "current" in connection with the instruction not to convert. According to Grossman, economically speaking "current" refers to "dollars of a particular year *in that year*[.]" *See* St. exh. 721, at 7, ¶ 18 (emphasis in original). Therefore, when Grossman read the instruction not to convert "to an equivalent value in current dollars[,]" he defined "current" differently, *i.e.*, as "dollars of a particular year in that year." *See* St. exh. 721 at 7, ¶ 18. Applying that definition to the instruction not to convert, Grossman surmised that the jury calculated lost rent in year 2000 dollars and in keeping with his reading of that instruction, the jury did *not* convert those dollars to the years in which those losses were sustained. However, in the context of the court's instruction not to convert, "current" actually meant year 2000 dollars. Based upon that definition, the jury was instructed that it was *not* to convert the dollar at the time of injury, *i.e.*, a 1795 dollar to current or year 2000 dollars.

The State is overlooking the fact, however, that "[l]ogical, not economic consistency is the touchstone[]" in evaluating a potentially inconsistent verdict. *Webb v. GAF Corp.*, 936 F. Supp. 1109, 1125 (N.D.N.Y. 1996) (citing, *inter alia*, *Crockett*, 65 F.3d at 278). Thus, although a jury's verdict *might* be inconsistent from an

economic standpoint, it does not necessarily follow, *a fortiori*, that that verdict is legally inconsistent. *See id.*

Having said that, the court recognizes that apparently to avoid the complex task of separating out specific rents for each of the 204 years at issue, the jury calculated lost rent by taking $3.5 million, or 10% of what it deemed to be the current value of the property ($35 million) and dividing it by each of the 204 years at issue. Presumably the jury found that that amount would adequately compensate the Cayuga for the accumulation of rental dollars for *all* of those 204 years. The effect of figuring lost rent in that way, when carried out over 204 years, according to the State, is to "overstat[e] the compensation in the early years and understat[e] it in the later years." St. Pre-Tr. Memo. at 75; *see also* Tr. at 6356-66. Assuming that is so, consistent with the court's explicit instruction *not* to consider interest because the court would do so at a later date, the jury recognized that it would be possible for the court to amend those rent figures and rectify that discrepancy through its award of prejudgment interest.

There is one additional reason for refusing to apply the State's rigid economic analysis to the jury's verdict which is that it would require the court to disregard firmly established legal principles—principles which were developed wholly apart from economic principles to preserve the efficient and fair administration of our judicial system. Adjusting the jury's verdict in conformity with the State's theory would require the court to find an inconsistency or conflict where none exists, which in turn would run afoul of the general notion that whenever possible a court must "reconcile and preserve even a seemingly inconsistent jury verdict." *See Indu*

Craft, 47 F.3d at 497 (citations omitted). Furthermore, adopting the State's interpretation of the jury verdict would thwart the "powerful" policy of deferring to a jury verdict—a policy which persists "even in cases in which the jury has taken action that is at first blush difficult to explain." *See Gentile v. County of Suffolk*, 926 F.2d 142, 154 (2d Cir. 1991) (citing *Auwood*, 850 F.2d at 891). This policy of preserving the sanctity of a jury's verdict is especially compelling in a case of this magnitude which, as this court has previously recognized, "has so widely impacted every member, Indian and non-Indian alike, in the claim area community." *See Cayuga XIV*, 2000 WL 654963, at *4.

II. Pre-Judgment Interest[6]

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[6] Before delving into the issue of prejudgment interest, there is a procedural irregularity which bears mentioning. Neither of the Cayuga plaintiffs expressly seek prejudgment interest in their respective complaints; only the U.S. does. *See Cayuga VIII*, 1999 WL 224615 at * 25 n. 34. Thus the issue is whether that omission constitutes a waiver of the right to seek such relief now, many years after the commencement of this action. The court finds that it does not.

Under federal common law, which this court has previously held governs the issue of prejudgment interest in this case, *see Cayuga VIII*, 1999 WL 224615, at *18, the failure of the Cayuga to explicitly request such interest in their complaints does not amount to a waiver of the right to such an award. *Cf. Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1182-83 (2d Cir. 1996) (citation omitted) (plaintiff did not waive her right to award of prejudgment interest in a Title VII action, even though she did not explicitly request such relief, where the failure to request was not plaintiff's fault in that she had no reason to be aware of district court's severe backlog, which significantly delayed judgment); *Frank v. Relin*, 851 F. Supp. 87, 90-91 (W.D.N.Y. 1994) (court awarded prejudgment interest even though plaintiff failed to request the same from jury). Furthermore, assuming they are otherwise entitled to

The issue of prejudgment interest first arose in this litigation in 1999 when through motions *in limine* the defendants sought to bar the Cayuga from recovering any prejudgment interest whatsoever. *See Cayuga VIII*, 1999 WL 224615, at *1. In addressing those motions, this court extensively discussed the guiding legal principles which courts should apply in deciding whether to allow an award of prejudgment interest. *See id.* at *15-*22. As part of that discussion, the court

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the same, a finding that the Nation and the Tribe are entitled to a prejudgment interest award even though they did not specifically request such relief in their respective complaints is consistent with both Fed. R. Civ. P. 15(b), freely allowing amendment to complaints to conform to the evidence, and Fed. R. Civ. P. 54(c), allowing a default judgment to be entered granting "the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings."

A finding of no waiver is bolstered by the fact that the State has not been prejudiced by this omission as is evidenced by the fact that it was the State which prior to Phase I first raised the specter of prejudgment interest on motions *in limine*. Therefore, the parties and the court have had ample opportunity to consider and address this issue. Furthermore, the court cannot overlook the affirmative demand for prejudgment interest in the U.S.' complaint in intervention. It stands to reason, given the trustee nature of the relationship between the U.S. and the Cayuga that this explicit demand should inure to the benefit of the Cayuga. Finally, the boilerplate language found in the Cayuga's respective complaints, that they are seeking "such other and further relief as the Court deems just[,]" *see* Nation Co. at 25, ¶ 11; Tribe Amended Co. at 10, ¶ 11, arguably is sufficient to include prejudgment interest, particularly given that the scope of remedies in an action such as this has not been previously litigated in full. Even if the existence of any one of the foregoing factors was insufficient to allow the Cayuga to seek prejudgment interest, given the absence of such a demand in their complaints, certainly these factors taken together justify allowing the Cayuga to proceed with their attempt to recover this interest.

reiterated a number of factors which the Second Circuit identified in *Wickham*, 955 F.2d 831, as being relevant to whether to allow recovery of prejudgment interest:

> [T]he award should be a function of (i) the need to fully compensate the wronged party for actual damages suffered, (ii) considerations of fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or (iv) such other general principles as are deemed relevant by the court. . . . These other 'general principles' include '[t]he certainty of the damages due the plaintiff[,]' and whether the statute itself already provides for 'full compensation and punitive damages[.]' . . . In addition to the factors enumerated above, '[t]he speculative nature of the damages in question will always be relevant to a sound decision on a consideration of whether prejudgment interest should be awarded.'

Cayuga VIII, 1999 WL 224615, at *19 (quoting *Wickham*, 955 F.2d at 833-34, 835, and 836). In *Cayuga VIII*, the court recognized that recovery of prejudgment interest has been allowed even when a federal statute is silent on that issue, as is the Nonintercourse Act, so long as those "discretionary awards . . . 'are fair, equitable and necessary to compensate the wronged party fully.'" *See id.* at *20 (quoting *Wickham*, 955 F.2d at 835). But, as this court further acknowledged, recovery of prejudgment interest has been disallowed in a number of situations, including: "'when the defendant acted innocently and had no reason to know of the wrongfulness of his actions, . . . when there is a good faith dispute between the parties as to the existence of any liability, or . . . when the plaintiff is responsible for the delay in recovery.'" *Id.*

at *20 (quoting *Cruz v. Local Union Number 3 of the Int'l Bdh. Of Elec. Workers*, No. CV89-4240, 1995 WL 374401, at *3 (E.D.N.Y. Feb. 17, 1995)) (other citation omitted).

Summarizing the import of this prejudgment interest body of case law, in *Cayuga VIII* this court commented: "What should be obvious by now is that '[i]nterest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness.'" *Id.* (quoting *Blau v. Lehman*, 368 U.S. 403, 413, 82 S. Ct. 451, 7 L. Ed. 2d 403 (1962)). When the defendants' motions *in limine* were before this court, the record was far from complete. Thus, the court declined to "make a prejudgment interest determination in [the] factual and legal vacuum[]" which existed at that time. *See id.* at *21. Recognizing the possibility of an abuse of discretion if it were to do so, the court denied those motions *in limine* to the extent they sought to preclude the Cayuga from recovering prejudgment interest altogether. *See id.* at *25.

Following Phase II, a five-week non-jury trial which included the testimony of a number of expert witnesses, the record is now fully developed as to the prejudgment interest issues which this litigation raises. The parties have also had ample opportunity to brief those issues. Accordingly, as Fed. R. Civ. P. 52 requires, the following constitutes the court's findings of fact and conclusions of law in this regard.

A. Wickham Analysis

The initial determination for the court is whether the Cayuga are entitled to an award of prejudgment interest in the first place. Only after making that deter-

mination will the court be in a position to consider the amount, if any, of such an award. In undergoing its *Wickham* analysis, the court will address the second factor listed therein, "fairness and relative equities," last because, as will be seen, the court is convinced that that factor is relevant not only to the issue of a party's entitlement to prejudgment interest, but also to the issue of the amount of any such award.

1. Full Compensation

Among other things, a prejudgment interest "award should be a function of . . . the need to fully compensate the wronged party, for actual damages suffered." *See Wickham*, 955 F.2d at 833. In arguing that a prejudgment interest award is necessary to fully compensate it, the Cayuga contend that they must be compensated for the lost "opportunity" cost, or, as the U.S. puts it, for the "time value of money[,]" *see* Pre-Trial Memorandum of the Plaintiff-Intervenor, U.S. ("U.S.Pre-Tr.Memo.") at 11 (internal quotation marks and citation omitted); that is, for not having the stream of rental income available to them over the past two centuries. The Cayuga also contend that the jury verdict was relatively low and hence prejudgment interest is necessary to assure that they are fully compensated. The State agrees that full compensation in the context of *Wickham* encompasses a "plaintiff receiv[ing] the full value of . . . money over the time during which plaintiff was deprived of that sum[,]" but it disagrees that " 'full compensation[]' . . . is . . . a function of the amount of damages a jury awards[.]" *See* St. Pre-Tr. Memo. 33.

Case law discussing "full compensation" as that phrase is used in *Wickham* is scant and not particularly instructive in this context. However, lost opportunity

cost as a part of full compensation is a widely accepted concept from a legal standpoint. Case law is replete with references to the time value of money. *See, e.g., Osterneck v. Ernst & Whitney*, 489 U.S. 169, 176, 109 S. Ct. 987, 103 L. Ed. 2d 146 (1989) (internal quotation marks and citations omitted) ("[W]e have repeatedly stated that prejudgment interest is an element of [plaintiff's] complete compensation."); *Proctor & Gamble Distrib. Co. v. Sherman*, 2 F.2d 165, 166 (S.D.N.Y.1924) (Hand, J.) ("The present use of my money is itself a thing of value, and, if I get no compensation for its loss, my remedy does not altogether right my wrong."); *Prager v. New Jersey Fidelity & Plate Glass Ins. Co.*, 245 N.Y. 1, 5-6, 156 N.E. 76 (1927) (Cardozo, J.) ("While the dispute as to the value was going on, the defendant had the benefit of the money, and the plaintiff was without it. Interest must be added if we are to make the plaintiff whole."). Courts' recognition of the time value of money is based upon the following reasoning, as succinctly put by one legal commentator:

> If justice were immediate, there would never be an award of prejudgment interest. The injured party would receive an enforceable judgment immediately, with no loss in value from the time value of money. Because justice often takes many years to achieve, interest is added to the original judgment to ensure that compensation is complete.

Michael S. Knoll, *Primer on Prejudgment Interest*, 75 Tex. L. Rev. 293, 294 (Dec. 1996) (footnotes omitted).

Furthermore, although the three economists who testified during Phase II differed greatly in their conclusions as to the proper amount of prejudgment

interest which this court might award, they agreed as to the meaning of opportunity cost and its relationship to prejudgment interest in this case. As the Cayuga's economist Dr. Temin defined it, "opportunity cost . . . [is] an economic term for the cost of [an] alternate activity[.]" Tr. at 5734. In terms of the Cayuga's lost opportunity cost in particular, Dr. Temin expounded:

> If the Cayugas had not been injured at that time in the amounts the jury determined for each year, they theoretically would have had the amounts for each year which the jury awarded, and could have used or invested those funds . . . . Without that property or money, they incur the opportunity cost of property or money. . . . If we compensate for an injury in 1795 (or other past year) as if it took place today, we ignore the opportunity cost of this injury. We compensate the injured party for the dollar amount of the injury, but not for the foregone use of the injury sustained as the injury at the time of loss.

Nat. exh. 64 at 6, ¶¶ 16 and 17. In a similar vein, the U.S.' economist Dr. Berkman explained:

> [I]f the jury found that there was a loss to the tribe, . . . as a consequence of actions in 1795 and they've identified those stream of losses, those losses by themselves don't compensate [the Cayugas] for those losses, . . . because it fails to recognize this opportunity cost . . . , that they, in addition to having those moneys, could have used those moneys for a variety of purposes or invested them, and we have to account for the fact that they would have benefitted from those incomes and prejudgment interest captures that additional benefit that they

> would have received, and that's the missing piece to make them whole.

Tr. at 5929. And although the State's economist, Dr. Grossman, radically departed from the other two economists insofar as his conclusion as to the amount of prejudgment interest which should be awarded here, he too agreed that the Cayuga had sustained a lost opportunity cost or, as he put it, the "missed opportunity of being able to invest." Tr. at 6087.

The economists are thus in agreement that in addition to sustaining monetary damages for the loss of their homeland over the past two centuries, the Cayuga have sustained monetary losses because they did not have that money available to them for investment or other purposes over the years. Such loss makes prejudgment interest necessary here to fully compensate the Cayuga. This conclusion is bolstered by the fact that the jury was explicitly instructed *not* to include prejudgment interest in its award, and as previously explained, it followed that instruction. *See National Communications Association, Inc. v. Telephone and Telegraph Col*, No. 92-CIV. 1735 (LAP), 1999 WL 258263 at *4 (S.D.N.Y. April 29, 1999) (plaintiff did not receive full compensation where no evidence suggested that the jury calculated and added such interest). Therefore, the Cayuga did not receive "complete compensation," which the Supreme Court has, as recently as June of this year, repeatedly defined as including such interest. *See State of Kansas v. State of Colorado*, 533 U.S. 1, ___, 121 S. Ct. 2023, 2029, 150 L. Ed. 2d 72 (2001) (citations omitted) ("Our cases since 1933 have consistently acknowledged that a monetary award does not fully compensate for an injury unless it includes an interest component.").

The Cayuga point out, as the court has noted, that the jury verdict of nearly $37 million was less than the $335 million suggested by the U.S.' real estate appraisal expert. *See Cayuga Indian Nation of New York v. Pataki*, Nos. 80-CV-930 and 80-CV-960, slip op. at 8 n.4 (N.D.N.Y. April 19, 2000). The verdict also was less than that suggested by the State's real estate appraisal expert who "testified that total damages ranged from approximately 62 million dollars to approximately 40 million dollars." *See id.* In light of the foregoing, in the absence of prejudgment interest the Cayuga assert that the $37 million jury award "does not constitute full or sufficient compensation . . . for the loss of their homeland." *See* Cayugas' Pre-Trial Memorandum ("Cay. Pre-Tr. Memo.") at 26. The court agrees with the Cayuga that prejudgment interest is necessary for full compensation; but the court is highly skeptical that such interest should be used as a vehicle to augment or increase the jury's verdict.

The Cayuga have not cited to any authority wherein a court has held that prejudgment interest is necessary to fully compensate a plaintiff based upon the supposed inadequacy of the verdict. What authority there is pertaining to how, if at all, verdict size impacts prejudgment interest is contradictory and does not involve a *Wickham* analysis. In *In Design v. K-Mart Apparel Corp.*, 13 F.3d 559 (2d Cir. 1994), the Second Circuit affirmed a district court's *denial* of prejudgment interest in a copyright case because there was a "sizable damage award" of $632,000.00. *See id.* at 569. The Second Circuit reached the opposite result, however, in *Sharkey v. Lasmo (AUL Ltd.)*, 214 F.3d 371 (2d Cir. 2000), where it held that in denying prejudgment interest the district court improperly relied upon its belief that "the jury's

award was already surprising[ly] genero[u]s[.]" *Id.* at 375 (internal quotation marks and citation omitted). Given the lack of directly relevant precedent, the court finds that regardless of the size of the verdict, the underlying purpose of prejudgment interest, to make the plaintiff whole again, *see City of Milwaukee v. Cement Division, National Gypsum Co.*, 515 U.S. 189, 196, 115 S. Ct. 2091, 2096, 132 L. Ed. 2d 148 (1995), would best be served by an award of prejudgment interest in this case.

2. Nature of Statute[7]

Another *Wickham* factor which impacts an award of prejudgment interest "is whether the federal statute under which damages have been obtained is remedial or punitive in nature." *See Nu-Life Construction Corp. v. Board of Education of the City of New York*, 789 F. Supp. 103, 104 (E.D.N.Y. 1992). Where a statute is remedial, such as Title VII, which aims "to make persons whole for injuries suffered on account of unlawful employment discrimination[,]" *see Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S. Ct. 2362, 45 L.Ed.2d 280 (1975), an award of prejudgment interest is appropriate. *See, e.g., O'Quin v. New York University Medical Center*, 933 F. Supp. 341, 344 (S.D.N.Y. 1996) (Title VII plaintiff entitled to prejudgment interest on back pay award given, *inter alia*, the "obvious remedial purposes" of that statute); *National Communications*

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[7] In *Wickham* the Second Circuit identified "the remedial purpose of the statute involved," and whether the statute itself already provides for full compensation and punitive damages, as separate factors which are a "function" of a prejudgment interest award. *See Wickham*, 955 F.2d at 834 and 835. Because those factors are so closely related, it is logical for the court to consider them together.

Association, 1999 WL 258263, at *5 (quoting 47 U.S.C. § 206 (1982)) (remedial purpose of Communications Act which "provides that a carrier which has violated th[at] Act 'shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation[]'" required prejudgment interest award). On the other hand, "where the statute itself already provides for full compensation or punitive damages," as do the antitrust laws, the Second Circuit has "suggested that prejudgment interest is improper[.]" *See Wickham*, 955 F.2d at 835 (citing, *inter alia*, *Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 80 (2d Cir. 1971)) (prejudgment interest unnecessary given Clayton Act's treble damage provision, combined with absence of congressional intent as to prejudgment interest), *rev'd on other grounds*, 409 U.S. 363, 93 S. Ct. 647, 34 L. Ed. 2d 577 (1973).

Naturally the plaintiffs and the State strongly disagree as to the nature of the statute at issue herein—the Nonintercourse Act. The Cayuga argue that because the purpose of that statute is to "prevent Indians from improvident dispositions of their lands and becoming 'homeless charges[,]'" it is remedial, thus mandating an award of prejudgment interest thereunder. *See* Cay. Post-Trial Memo. at 4 (quoting *Cayuga Indian Nation of New York v. Cuomo*, 565 F. Supp. 1297, 1323 (N.D.N.Y. 1983) ("*Cayuga II*")). Echoing this argument, the U.S. declares that "the oft-recognized protective purposes of the Nonintercourse Act against alienation of Indian lands easily encompasses the invocation of prejudgment interest in this case." U.S. Pre-Tr. Memo. at 28; and U.S. Post-Tr. Memo. at 7. The State's view of the Nonintercourse Act is the antithesis of the Cayuga's. The State deems that Act to be "prohibi-

tory," and hence this court should refuse to award prejudgment interest. *See* St. Pre-Tr. Memo. at 50.

The Nonintercourse Act does not fit neatly into the category of either a remedial or a punitive statute. That statute *may*, as the State urges, be prohibitory in that broadly speaking it proscribes the acquisition of Indian lands without the Federal Government's approval. However, that prohibition does not necessarily render the Nonintercourse Act punitive. In fact, this court has previously recognized as much, albeit in a slightly different context, when in *Cayuga II* it held that it could not "accept the view that . . . the Nonintercourse Act . . . imposes a 'penalty' or 'punishment'[.]" *See Cayuga II*, 565 F. Supp. at 1327. This court went on to explain that the Nonintercourse Act "declares that certain transactions in land are of no validity in law or equity[;]" and "[t]he purpose of this restraint against alienation, . . ., was to protect Indian possessory rights." *Id.* In concluding that the Nonintercourse Act was "not penal[,]" this court further reasoned "[t]hough enforcement could work great hardship upon those who claim title through a transaction which is invalid under the Act, it is . . . manifest that the statutory disability was established *not to punish*, but to accomplish 'some other legitimate governmental purpose.'" *Id.* at 1328 (quoting *Trop v. Dulles*, 356 U.S. 86, 96, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958)) (emphasis added). In light of the foregoing, the State's argument that the Nonintercourse Act is prohibitory or punitive is misplaced.

The absence of a punitive damage provision in the Nonintercourse Act lends further credence to the view that that statute is not punitive. Moreover, as this court thoroughly explained in *Cayuga II*, there is a "ju-

dicial consensus" as to the purpose of the Nonintercourse Act, which is that Congress intended "'to protect the lands of the Indian tribes in order to prevent fraud and unfairness.'" *Id.* at 1322 (quoting *In Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, 656 (D. Me. 1975)). As the case law outlined in *Cayuga II* shows, that protective purpose is "rather self-evident." *Id.* at 1323. In fact, in recognizing an implied private cause of action under that statute, the Second Circuit acknowledged the availability of a concomitant damage remedy, even in the absence of statutory language to that effect. *See Oneida Indian Nation of New York State v. County of Oneida*, 719 F.2d 525, 540 (2d Cir. 1983). Consequently, even though "the Nonintercourse Act of 1793 did *not* establish a comprehensive remedial plan for dealing with violations of Indian property rights," and even though it "contains *no* remedial provision[,]" *Oneida County, N.Y. v. Oneida Indian Etc.*, 470 U.S. 226, 239, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985) ("*Oneida II*") (emphasis added), that lack of a remedial framework does not undermine the fact that at its core the Nonintercourse Act is remedial in nature.

Neither the silence of the Nonintercourse Act as to prejudgment interest, nor the fact that it does not expressly provide for "full" or "just" compensation alters the court's view that fundamentally this statute is remedial. The fact that there is no mention of prejudgment interest in the Nonintercourse Act does not mean, as the State suggests, that such interest is not recoverable thereunder. Indeed, in *Wickham* the Second Circuit catalogued a number of Supreme Court decisions wherein recovery of prejudgment interest was allowed "under a variety of federal laws, *despite the*

silence of the laws on the subject of interest." *See Wickham*, 955 F.2d at 834 (and cases cited therein) (emphasis added). *Wickham* itself was such a case; there, the Second Circuit upheld an award of prejudgment interest under the Labor Management Relations Act ("LMRA"), even though that statute is silent on the issue of such interest. *See id.* at 933-936; *see also Securities & Exch. Comm'n v. First Jersey Sec., Inc.*, 101 F.3d 1450 (2d Cir. 1996) (affirming prejudgment interest award of approximately $52 million despite, *inter alia*, the absence of explicit statutory authorization).

This court is fully aware, as the State notes, that it is possible to infer intent to deny prejudgment interest from a statute's silence. Pursuant to *Wickham*, such intent may be inferred "from (i) the state of the law on prejudgment interest, for the type of claim involved, at the time the statute was passed, and (ii) consistent denial by the courts of prejudgment interest under the statute and failure by Congress, despite amendments to the statute, to address prejudgment interest awards." *Wickham*, 955 F.2d at 834 (citing *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 336-39, 108 S. Ct. 1837, 100 L. Ed. 2d 349 (1988)). Neither of those criteria are met in the present case however. Despite the vast record and the voluminous briefs, there is absolutely nothing before this court regarding the state of the law with respect to prejudgment interest when the Nonintercourse Act was first enacted in 1790. The State attempts to make much of the fact that the Nonintercourse Act has gone through a number of permeations with no mention of prejudgment interest. As already discussed though, that silence is irrelevant

because prejudgment interest is recoverable even when a statute is silent on that issue.

In any event, the second criteria for inferring intent to deny recovery of prejudgment interest is also absent here. There is no history of denial of prejudgment interest under the Nonintercourse Act. Therefore, the Nonintercourse Act's silence regarding prejudgment interest is of little consequence in determining whether to allow the recovery of same here, and certainly does not foreclose such an award in this case.

Moreover, the extremely limited history of prejudgment interest recovery under the Nonintercourse Act is to the contrary. As the Cayuga note, in *Oneida II*, another eastern land claim case brought pursuant to the Nonintercourse Act, the district court did "award[] the Oneidas damages in the amount of $16,694, *plus interest*[.]" *See* 470 U.S. at 230, 105 S. Ct. 1245 (emphasis added). As outlined in *Cayuga X*, given the posture of that case on appeal, "[t]he propriety of an interest award was not before either the Second Circuit or the Supreme Court[]" in that case. *See Cayuga Indian Nation of New York v. Cuomo*, 1999 WL 509442, at *17 (N.D.N.Y. 1999) ("Cayuga X"). Therefore, the court rejects the Cayuga's argument that the *Oneida* district court's award of prejudgment interest for a mere two years, on damages less than $20,000.00, somehow provides justification for an award of prejudgment interest in this case where, among other differences, the damages span two centuries.

Likewise, the court does not give much credence to the State's argument that because the Nonintercourse Act does not contain explicit language authorizing "just" or "entire" compensation thereunder, the Cayuga should not be allowed to recover prejudgment interest.

It is the presence, not the absence, of such language which augurs against an award of prejudgment interest. In a similar vein, because the Nonintercourse Act does not provide for exemplary damages or other excess recovery, the *Wickham* Court's admonition against the recovery of prejudgment interest under those circumstances is inapplicable here. *See Webb v. GAF Corp.*, 949 F. Supp. 102, 106 (N.D.N.Y. 1996) (citing *Wickham*, 955 F.2d at 839).

To conclude, the court agrees with the Cayuga that the Nonintercourse Act's silence does *not* bar prejudgment interest here. Nor does the fact that that statute does not expressly provide for full or just compensation prevent the recovery of prejudgment interest. Furthermore, on balance the court is convinced that the Nonintercourse Act is essentially remedial, so that if otherwise appropriate, prejudgment interest should be allowed thereunder.

3. "Other General Principles"

As mentioned at the beginning of this court's *Wickham* analysis, among the "other general principles" which courts have deemed relevant to the issue of whether to award prejudgment interest in any given case are "[t]he certainty of the damages due the plaintiff[,]" and conversely "[t]he speculative nature of the damages in question[.]" *See Wickham*, 955 F.2d at 835 and 836. The former factor, the certainty of the damages, "is the progeny of the old common law rule that forbade prejudgment interest when the damages were unliquidated or unascertainable up until the time of judgment." *Webb*, 949 F. Supp. at 106 (citing 5 Corbin On Contracts § 1048 (1964)). That rule has been relaxed, however, and "[p]rejudgment interest is now commonly awarded in cases where the loss cannot be

determined with certainty at the time of injury, but is susceptible to calculation by the time of trial or judgment, e.g., wrongful termination cases, securities fraud cases, [and] patent infringement cases." *See Thomas v. City of Mount Vernon*, No. 89 Civ. 0552, 1992 WL 84560, at *1 (S.D.N.Y. April 10, 1992) (citing *Wickham*, 955 F.2d at 835-36). On the other hand, where damages awarded to a plaintiff in a section 1983 action for her false arrest were "unliquidated and inherently speculative[,]" in that they were based "exclusively" on her "emotional injuries[,]" and she had not sustained any "economic injury[,]" the court denied her motion for prejudgment interest. *See Sulkowaska v. City of New York*, No. 99 Civ. 4228, 2001 WL 428253, at *6 (S.D.N.Y. April 25, 2001) (internal quotation marks and citations omitted).

Only the State addressed these "other general principles" which are relevant to a "sound decision" as to whether or not to award prejudgment interest. *See Wickham*, 955 F.2d at 836. Prior to Phase I the State baldly declared "that a damages calculation which rests upon estimates of fair market value and rental or cash value of what was in effect wilderness land over 200 years ago is highly uncertain and speculative." State of New York Defendants' Trial Memorandum (St. Ph. I Tr. Memo.) at 66. Thus, reasoned the State, application of prejudgment interest "to such an award [would] severely exacerbate[] this inherent weakness in the damage calculation." *Id.* After the jury verdict and prior to Phase II, the State refined its argument. Given the admittedly "contradictory testimony" as to the proper methodology for valuing the subject property, and the experts' "widely divergent opinions as to the ultimate value of lost rents for property in the claim

area[,]" the State now asserts that the jury's *methodology* for calculating damages was speculative, and hence it "caution[s] *against* an award of prejudgment interest where the other factors tip in favor of the State." St. Pre-Tr. Memo. at 53 and 52 (emphasis added).

The State's argument does not carry much weight with this court. Given the extraordinarily unique nature of this litigation, obviously the damages awarded by the jury were not as readily quantifiable as, for example, a back pay award in a Title VII case. *See, e.g., McIntosh v. Irving Trust Co.*, 873 F. Supp. 872, 882 (S.D.N.Y. 1995) (emphasis added) (amount of back pay award in Title VII action "calculable by reference to the *specific amounts* of *money* the plaintiff has lost and the defendant has withheld[]"). By the same token, however, the damages awarded in this case are not "so conjectural that prejudgment interest should not be awarded." *See Wickham*, 955 F.2d at 836. To illustrate, this is not a situation such as that presented in *Thomas* 1992 WL 84560, at *3, wherein the court observed that even if it had the discretion to award prejudgment interest, it would not because "plaintiff sustained no economic injury; he was not deprived of money he would have otherwise earned but for the wrongdoing of the defendants." Plaintiff's injuries in *Thomas* "were, for the most part, intangible and defendants' unconstitutional behavior did not enable them to obtain any financial benefits from their wrongdoing." *Id.* at *4 (citation omitted). *Accord McIntosh v. Irving Trust Co.*, 873 F. Supp. 872, 882 (S.D.N.Y. 1995) (citations omitted) (refusing to award prejudgment interest under New York CPLR § 5001 for pain and suffering because those damages were "not so easily calculated

and represent[ed] the jury's translation into monetary terms of a loss that is difficult to quantify[]"—a loss "not easily divided into specific periods like back pay and [which] does not represent an amount that the defendant has withheld from the plaintiff in the same way that awards in contract or property actions do[]").

By contrast, in the present case there is no dispute that the Cayuga sustained economic loss as a result of being deprived of their homeland for more than 200 years, and the jury so found. Undoubtedly the fair rental value damages in particular were difficult for the jury to calculate given the conflicting and varying methodologies offered by the real estate appraisal experts during Phase I. That difficulty does not render the damages inherently speculative, however. After all, the Cayugas did sustain a tangible loss—their property. The difficulty or complexity of calculating damages "should not obscure the fact that there was a reasonable basis in the evidence to support the jury's award[,]" and "the overall basis for the damage award was [not] so speculative as to render it invalid." *See National Communications Association*, 1999 WL 258263, at *4 (internal quotation marks and citation omitted).

Moreover, as the *Wickham* Court astutely recognized, "while the presence of abstruse inquiries and difficult questions of proof in the calculation of damages are factors to be considered carefully, these problems must be considered *together* with other factors that may favor prejudgment interest." *Wickham*, 955 F.2d at 836 (internal quotation marks and citation omitted) (emphasis added). Here, the other *Wickham* factors discussed to this point favor an award of prejudgment interest. So, while admittedly there is a "degree of

speculation" in trying to ascertain the fair rental value of the subject property across a 200 plus year time frame, the court will not rule out a prejudgment interest award on the basis of this factor alone.

Furthermore, the State misses the mark when it focuses upon the purportedly speculative nature of the method by which the jury calculated damages. It is the speculative or conjectural nature of the damages themselves which potentially could impact an award of prejudgment interest—not the method by which those damages were calculated. Finally, as should be evident by now, the court wholeheartedly disagrees with the State that the *Wickham* factors discussed in the preceding sections weigh in its favor, and thus the purportedly speculative nature of the damages herein should weigh against an award of prejudgment interest. That is not to say, however, that the relative uncertainty of the damages will not enter into this court's calculation of the amount of prejudgment interest due here. It *may* be that, in taking into account the fairness and relative equities of a prejudgment interest award, the relative uncertainty of the damages, could be a basis, among others, for reducing the amount of any such interest which the court may award in this case.

4. Fairness and Relative Equities

"Considerations of fairness and relative equities" dominated Phase II. *See Wickham*, 955 F.2d at 834. Here, analysis of this particular *Wickham* factor has centered on the State's claim that at all relevant times it acted in good faith in its treatment of the Cayuga, and the related claim that the Cayuga delayed in bringing this action. For now the court will focus on the State's claim of good faith which was one of the most

significant and contentious issues of Phase II, as is evidenced by the extensive historical proof.

Before considering how the State's good faith or lack thereof impacts the issue of prejudgment interest, there is a need for some clarification. The U.S. insists that in examining the fairness and relative equities, the court should concentrate on the jury award itself. As *Wickham* makes clear, however, the focus is on the fairness and relative equities of the prejudgment interest award, not the jury award. *See Wickham*, 955 F.2d at 834. With that in mind, the court will next address the parties' arguments as to what role fairness and relative equities should play in analyzing the prejudgment interest issue.

By arguing that "the State's claim of 'good faith' does *not* affect prejudgment interest[,]" and that "[n]either [that asserted] 'good faith' nor 'laches' present an obstacle to an award of prejudgment interest in this case," the Cayuga are taking the position that despite *Wickham* and its progeny, this court should *not* weigh the relative equities in deciding whether to award such interest. *See* Cay. Pre-Tr. Memo. at 31. Similarly, the U.S. maintains that "notions of 'fairness' and the 'equities,' . . . *cannot be seen as justification for a* . . . decision to *deny or limit* prejudgment interest on monies historically owing . . . , to the Cayugas." U.S. Pre-Tr. Memo. at 18-19 (citation omitted) (emphasis added). The U.S. further reasons that "assuming, *arguendo*, that either the State was acting in good faith, *or* . . . that the Cayugas were less than innocent in all of these proceedings, the propriety for an award of prejudgment interest here would not change." *Id.* at 18 (citing *City of Milwaukee*, 515 U.S. 189, 115 S. Ct. 2091, 132 L. Ed. 2d 148 (1995)) (emphasis added). In other

words, the plaintiffs are arguing that regardless of whether or not the State acted in good faith, and regardless of whether or not the Cayuga delayed in bringing this action, they are entitled to an award of prejudgment interest. The court's reading of the relevant case law does not support these arguments.

In arguing that fairness and relative equities have no place in this court's analysis of prejudgment interest, the plaintiffs are effectively arguing that *Wickham* is no longer good law. In support of that proposition, the plaintiffs heavily rely upon two Supreme Court cases, *West Virginia v. United States*, 479 U.S. 305, 107 S. Ct. 702, 93 L. Ed. 2d 639 (1987), and *City of Milwaukee*, 515 U.S. 189, 115 S. Ct. 2091, 132 L. Ed. 2d 148, which they contend substantially erode the notion of balancing the equities in the context of prejudgment interest.

To be sure, in *West Virginia*, the Supreme Court did reject the view "that whether [prejudgment] interest had to be paid depended on a balancing of equities between the parties[.]" *See West Virginia*, 479 U.S. at 311 n. 3, 107 S. Ct. 702. It is likewise true that in *City of Milwaukee*, the Supreme Court explained that by reading *West Virginia* "as disapproving of a 'balancing of the equities' as a method of deciding whether to allow prejudgment interest[,]" . . . , the Seventh Circuit "deepened an existing Circuit split regarding the criteria for denying prejudgment interest in maritime collision cases." *City of Milwaukee*, 515 U.S. at 193, 115 S. Ct. 2091 (citations omitted). The Court in *City of Milwaukee* further explained that prejudgment interest should be awarded in maritime collision cases, "subject to a limited exception, for 'peculiar' or 'exceptional' circumstances." *Id.* at 195, 115 S. Ct. 2091 (citations omitted). That limited exception does not

include "the existence of a legitimate difference of opinion on the issue of liability" because such a dispute "is merely a characteristic of most ordinary lawsuits[;] [i]t is not an extraordinary circumstance that can justify denying prejudgment interest." *Id.* at 198, 115 S. Ct. 2091 (citation omitted). In holding, *inter alia*, that a good faith dispute over liability does not justify denying prejudgment interest, and indeed that such a dispute "carries little weight[,]" the Supreme Court reasoned that "[i]f interest were awarded as a penalty for bad-faith conduct of the litigation, the City's argument would be well taken. But prejudgment interest is not awarded as a penalty; it is merely an element of just compensation." *Id.* at 197, 115 S. Ct. 2091.

This court is fully cognizant of the Supreme Court's rulings in both *West Virginia* and City of Milwaukee.[8] Those two cases are readily distinguishable from the present case. In finding that *City of Milwaukee* does not govern this court's analysis of prejudgment interest, the court first notes that *City of Milwaukee* involved a maritime collision where there is a "traditional hospitality to prejudgment interest[.]" *See City of Milwaukee*, 515 U.S. at 196, 115 S. Ct. 2091. In fact, the observation has been made that "[a]dmiralty courts have long been more sympathetic to the award of prejudgment interest than have the law courts[,]" and "have developed an independent approach to the prejudgment interest problem." *See* Comment, *Prejudgment Interest: Survey and Suggestion*, ("Survey"), 77

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[8] In fact, as the parties are well aware, in *Cayuga X* this court discussed *West Virginia*, albeit in the context of the State's alleged sovereign immunity from liability for prejudgment interest. *See Cayuga X*, 1999 WL 509442, at *15-*16.

Nw. U. L. Rev. 192, 193 and 214 (1982) (footnote omitted).

Moreover, the prejudgment interest award in *City of Milwaukee* was calculated for a mere 18 years between the date of the accident and the entry of judgment. The present land claim litigation is a far cry from a typical admiralty case such as *City of Milwaukee*. Here, the initial injury occurred in 1795, and hence there is a potential for prejudgment interest spanning over two centuries. Also in sharp contrast to admiralty cases where the time between injury and judgment is relatively short, in this land claim action there is no precedent for remedies, let alone a "traditional hospitality to prejudgment interest[.]" *See City of Milwaukee*, 515 U.S. at 196, 115 S. Ct. 2091. Given the obvious factual distinctions between *City of Milwaukee* and the current action, the court does not read that case as broadly as do the Cayuga, *i.e.*, indicating that it is *never* appropriate for a court to balance the equities in deciding whether or not to award prejudgment interest.

Likewise, *West Virginia*, 479 U.S. 305, 107 S. Ct. 702, 93 L. Ed. 2d 639, is easily distinguishable from the present case. Again, the Court's rejection in *West Virginia* of a balancing of the equities approach to prejudgment interest was in an entirely different context than here. The issue in *West Virginia* was whether a state was obligated to pay prejudgment interest to the Federal Government, and the Court held that it was. The propriety of a prejudgment interest award in a dispute between a state and the Federal Government implicate very different policy concerns than those here. In *West Virginia*, the Court was guided by the fundamental principle that "States have no sovereign immunity as against the Federal Government[.]" *West*

Virginia, 479 U.S. at 313, 107 S. Ct. 702. Obviously that policy has no bearing on the present litigation which in its current posture pits the Cayuga and the U.S. against the State of New York.

The temporal relationship between *West Virginia* and *Wickham* also militates against a finding that *West Virginia* governs the issue of prejudgment interest herein. *West Virginia* preceded the Second Circuit's decision in *Wickham* by almost exactly five years. Thus, if the Second Circuit deemed *West Virginia* to have altered the standards by which prejudgment interest should be awarded in this Circuit, surely it would have mentioned tnat Supreme Court decision in *Wickham*, but it did not. And although *City of Milwaukee* was decided several years after *Wickham*, that does not necessarily mean that the former case undermines the continuing vitality of *Wickham*. That is especially so given that *City of Milwaukee* was a maritime collision case and arguably limited to that context. Thus, despite the Cayuga's arguments to the contrary, nothing in either *City of Milwaukee* or *West Virginia* persuades this court to abandon its earlier views, as expressed in *Cayuga VIII*, that fairness and relative equities including the State's asserted good faith are relevant to an analysis of prejudgment interest. *See Cayuga VIII*, 1999 WL 224615, at *20-*21.

In arguing against balancing the equities, time and again the Cayuga harken back to the compensatory nature of prejudgment interest. The court is keenly aware of this aspect of prejudgment interest. *See, e.g., Securities and Exchange Commission v. Tome*, 638 F. Supp. 638, 640 (S.D.N.Y. 1986), *aff'd on other grounds*, 833 F.2d 1086 (2d Cir. 1987) (quoting *Norte & Co. v. Huffines*, 416 F.2d 1189, 1191 (2d Cir. 1969)). The court

is equally cognizant, however, that the Second Circuit has recognized more than once, that these "compensatory principles *must be tempered by an assessment* of the *equities*." *See Lodges 743 and 1746, Etc. v. United Aircraft*, 534 F.2d 422, 447 (2d Cir. 1975) (internal quotation marks and citations omitted). Tempering the compensatory nature of prejudgment interest with the equities is critical in this unique lawsuit for a number of reasons, not the least of which is the conclusion of the Cayuga's economist that they are entitled to recover $1.7 billion in prejudgment interest.

To summarize, the court finds no merit in the Cayuga's argument that in deciding whether to award prejudgment interest, the court need not consider the equities. Indeed, considerations of fairness and relative equities will factor into the court's initial determination as to the propriety of awarding the Cayuga prejudgment interest, as well as into the court's calculation of such award, if any.

Even though the court will consider fairness and relative equities, the court does not agree with the State that those equities are "dispositive" and require *denying* an award of prejudgment interest. *See* St. Pre-Trial at 35. More specifically, the State contends that its "level of . . . culpability" is a "determinative factor[;]" and because in the State's view there has been no showing of culpable conduct on its part with respect to any aspect of the underlying treaties, the court should deny prejudgment interest altogether to the Cayuga. *See id.* at 38.

This argument is disingenuous at best. Since its April 15, 1999, decision in *Cayuga VII*, the court has stressed that in all likelihood it would be guided by *Wickham*, which involves not one, but a host of factors.

in deciding the availability of prejudgment interest in any given case. Therefore, it should come as no surprise to the State that the court gives no credence to the notion that the level of a party's culpability is somehow dispositive of the issue of whether to award prejudgment interest. Moreover, the thoroughly developed historical record in this case belies the State's assertion that it did not engage in *any* culpable conduct insofar as the Cayuga are concerned. Even if the State could show that it acted in good faith, that would "not automatically render an award of interest improper." *See Association of Surrogates and Supreme Court Reporters Within the City of New York v. State of New York*, 772 F. Supp. 1412, 1418 (S.D.N.Y. 1991) (citing *E.E.O.C. v. County of Erie*, 751 F.2d 79, 81 (2d Cir. 1984)). Consequently, the State's good faith, even if proven, would not be a sufficient basis upon which to bar an award of prejudgment interest especially where, as here, the other *Wickham* factors tip in favor of such an award.

In addition, the State is conveniently overlooking case law which contradicts its argument that it can avoid liability for prejudgment interest by proving its good faith. In *Webb*, 949 F. Supp. 102, the court rejected such an argument reasoning that because "prejudgment interest is compensatory, not punitive, . . . 'wrongdoing by a defendant is not a prerequisite to an award[,]'" the "defendant's good faith d[id] not shift the balance of equities away from a grant of prejudgment interest[.]" *Id.* (quoting *Lodges 743 and 1746*, 534 F.2d at 447). Applying the same reasoning as the *Webb* court, in *Trapani v. Consolidated Edison Employees' Mutual Aid Society, Inc.*, No. 85 CIV. 2690, 1988 WL 138129 (S.D.N.Y. Dec. 14, 1988), the court

rejected defendant's argument that prejudgment interest "should be denied because [its] actions were at all times motivated by good faith and because defendant did not divert any of its funds for improper or venal purposes." *See id.* at *1 (citations omitted).

Having determined that it is not only proper but necessary for the court to consider fairness and relative equities in resolving the issue of prejudgment interest, the court is compelled to comment briefly upon the scope of its equitable discretion. The State is arguing that if this court decides to award prejudgment interest, "[a]n assessment of the relative equities[,]" including the State's alleged good faith, should have some bearing on the court's calculation of that award. *See* St. Pre-Tr. Memo. at 35 n.6. The Cayuga disagree, claiming that the "[c]ourt may *not* use the State's purported good faith to reduce the [amount of] prejudgment interest rightfully due to the[m]." Cay. Post-Tr. Memo. at 26. The U.S. similarly maintains that "[t]he [c]ourt lacks discretion to *limit* prejudgment interest based on the equities." U.S. Pre-Trial Memo. at 17 (emphasis added). The issue thus becomes whether the court may rely on fairness and relative equities in deciding the amount of any prejudgment interest which it may award herein, or whether those factors are only relevant to the decision as to the availability of such an award in the first place.

"[C]ourts have done little to sketch the limits of acceptable discretion[]" when it comes to the issue of prejudgment interest. *See Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1334 (7th Cir. 1992). Keeping in mind that prejudgment interest is above all else an equitable remedy, *see Commercial Union Assur. Co., plc v. Milken*, 17 F.3d 608, 614 (2d Cir. 1994)

(citation omitted), however, the court is of the conviction that its discretion encompasses not only the threshold decision as to whether to allow recovery of prejudgment interest, but also the discretion to determine the amount, which encompasses setting the rate, the accrual date and the methodology for computing such interest.

a. Burden of Proof

There is another issue—the burden of proof—which the court must address before scrutinizing the historical proof which is the cornerstone of the parties' equitable arguments. There are two components to the burden of proof issue here. The first is which party bears the burden in terms of the prejudgment interest award itself. Resolution of that issue is relatively straightforward.

"Prejudgment interest, . . . , is 'an element of complete compensation.'" *Loeffler v. Frank*, 486 U.S. 549, 558, 108 S. Ct. 1965, 100 L. Ed. 2d 549 (1988) (quoting *West Virginia*, 479 U.S. at 310, 107 S. Ct. 702). As such, this court has previously held that "the Cayugas must shoulder the burden of proof with respect to damages[.]" *Cayuga VIII*, 1999 WL 224615, at *12. Consistent with the foregoing, the plaintiffs concede, and the State agrees, that they have the burden of establishing " the extent and scope of prejudgment interest[.]" *See* Plaintiff-Intervener United States' Response to Defendants' Post-Hearing Brief ("U.S. Resp.") at 22; *see also* St. Post-Tr. Memo. at 62 (citations omitted) ("[A] plaintiff should bear the burden of establishing the existence and breadth of [its] entitlement to prejudgment interest[.]").

That burden does not necessarily require that the Cayuga prove their initial entitlement to a prejudgment interest award. For one reason, prejudgment interest "is presumptively available to victims of federal law violations." *Worthington v. City of New Haven*, No. 3:94-CV-00609, 1999 WL 958627 (D. Conn. Oct. 5, 1999), at *17 (internal quotation marks and citation omitted). Cognizant of this presumption, the court in *Maney v. United Sanitation, Inc.*, No. 99 Civ. 8595, 2000 WL 1191235, at *6 (S.D.N.Y. Aug. 21, 2000), exercised its discretion in favor of awarding plaintiff prejudgment interest in an action to confirm an arbitration award pursuant to the LMRA.[9] Arguably the Cayuga are presumptively entitled to recover prejudgment interest because this court has previously held that they were subject to Nonintercourse Act violations in 1795 and again in 1807. Second, and even more important even if the Cayuga are not entitled to the benefit of this presumption, arguably at this point they are entitled to an award of prejudgment interest because the three *Wickham* factors discussed so far all weigh in favor of such an award. As they recognized, however, the burden of proof still remains with the plaintiffs to establish the amount of prejudgment interest to which they may be entitled.

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[9] *Accord Raybestos Products Co. v. Younger*, 54 F.3d 1234, 1247 n.18 (7th Cir. 1995) (citation omitted) (presuming the jury's award included an interest augmentation "in no way conflict[ed] with th[at] circuit's well-established principle that prejudgment interest is presumptively available to victims of federal law violations[]"); and *S.E.C. v. Antar*, 97 F. Supp. 2d 576, 591 (D.N.J. 2000) ("[P]rejudgment interest in federal court litigation is generally the rule and not the exception.").

The second and more vigorously disputed burden of proof issue pertains to the State's good faith or lack thereof. As previously noted, the parties' equitable arguments are framed principally in terms of such good faith. The Cayuga assert that in the present case because the State claims that its good faith should relieve it from liability for any prejudgment interest award, or, alternatively, that its good faith should reduce the amount of such an award, the State must prove the same by a preponderance of the evidence. In terms of defining the scope of that good faith burden, without citing to any authority and without defining its terms, the Cayuga are taking the position that the State must prove that it "acted *affirmatively* in good faith." *See* Cay. Reply at 23 (emphasis added).

On the other hand, the State contends that to establish their entitlement to prejudgment interest, the Cayuga bear the burden of proof, which according to the State, "includes showing that the State did not act in good faith." *See* St. Pre-Tr. Memo. at 61; and St. Reply at 7. The court agrees with the Cayuga that because the State's good faith argument is akin to an affirmative defense in that it is responding to the Cayuga's claim for prejudgment interest, *see National Union Fire Ins. v. City Sav., F.S.B.*, 28 F.3d 376, 393 (3rd Cir. 1994), the burden lies with the State to prove the same. The court does not agree that the State has an obligation to show that it *affirmatively* acted in good faith, however.

This good faith/bad faith inquiry falls under the rubric of the second *Wickham* factor—considerations of fairness and relative equities. There is limited case law expounding upon this particular *Wickham* factor. Recognizing that an award of prejudgment interest "should

be based on fundamental considerations of fairness," the Second Circuit in *Norte*, 416 F.2d 1189, a derivative stockholders' action, remanded on the issue of prejudgment interest. In so doing, the Second Circuit directed the district court to "make specific findings, . . . , on the personal wrongdoings" of the defendants. *Id.* at 1191. Consistent with that directive of the *Norte* Court, the district court in *Securities and Exchange Commission v. Tome*, 638 F. Supp. 638 (S.D.N.Y. 1986), *aff'd on other grounds*, 833 F.2d 1086 (2d Cir. 1987), held, *inter alia*, that the equities did not weigh in favor of the defendant because he "*willfully violated* the securities *laws* and thereafter *attempted*, through lies and deceit, to *cover-up* his role in the illegal activity[.]" *Id.* at 640 (emphasis added). The court also pointed to the fact that the defendant "remained outside the United States to avoid prosecution on related criminal charges." *Id.* Likewise, in *S.E.C. v. Drexel Burnham Lambert, Inc.*, 837 F. Supp. 587 (S.D.N.Y. 1993), *aff'd on other grounds*, 16 F.3d 520 (2d Cir. 1994), the district court awarded prejudgment interest against two repeat offenders under the securities laws who had participated in a "blatant scheme to defraud," and who had continuously refused to recognize the wrongfulness of their actions. *Id.* at 609.[10] In examining fairness and relative equities, at least in the securities context, courts evaluate a defendant's intent and the nature of the defendant's wrongdoing.

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[10] *But see Mecca v. Gibraltar Corp. of America*, 746 F. Supp. 338, 349-50 (S.D.N.Y. 1990) (declining to award prejudgment interest in securities case where investors were fully compensated for injuries; defendants were liable only on claim requiring no reliance or causation; and jury exonerated defendants on fraud and racketeering charges).

Outside the securities law context a party's intent has also been deemed relevant to an assessment of the fairness and relative equities of a prejudgment interest award. For example, in *Cruz*, 1995 WL 374401 at *4 (emphasis added), the court granted an award of prejudgment interest because, among other reasons, the "relative equities" supported such an award in that the defendant "Union *did not act innocently nor was it unaware of its actions* with regard to its failure to fairly represent the plaintiffs." *Id.* at *4 (emphasis added). In reaching this conclusion, the district court observed that on an earlier appeal "[t]he Second Circuit [had] agreed that the evidence supported the jury's finding that the Union failed, *arbitrarily*, to pursue the plaintiffs' grievances." *Id.*

In fact, in *Wickham* itself the Second Circuit affirmed an award of prejudgment interest where, among other reasons, "there [wa]s *no basis* in the history of the dispute between Wickham and the union *for concluding* that the union *acted innocently or that* the *union's actions* against Wickham were *taken in good faith.*" *Wickham*, 955 F.2d at 839 (emphasis added). Furthermore, the Second Circuit reasoned, "[t]here is every indication in this case that the union *knew* it was *clearly violating* a *specific statutory duty* erected by the LMRA." *Id.* (emphasis added). Beyond this the Court did not elucidate what constitutes good faith for prejudgment interest purposes.

In light of the foregoing, in demonstrating its good faith the State must show more than simply the absence of bad faith. The court will examine the record to determine, *inter alia*, whether the State knew it was clearly violating the Nonintercourse Act and whether it willfully violated that statute. The court will also con-

sider whether the record as it is presently constituted supports a finding that the State "acted innocently and had no reason to know of the wrongfulness of [its] actions," *see Wickham*, 955 F.2d at 834 (citing *Jackson County*, 308 U.S. at 352-53, 60 S. Ct. 285), not just with respect to the Nonintercourse Act, but in terms of all its dealings with the Cayuga as chronicled in the vast historical proof before the court. The State will not, however, be required to show that its actions were primarily directed to protect the Cayuga and their interests during the relevant time frames.

Historical Evidence

"What is history but a fable agreed upon?"[11]

Napoleon Bonaparte

During Phase II the court heard the testimony of three experts regarding the historical aspects of this land claim litigation: Laurence M. Hauptman, Ph.D., currently a State University of New York ("SUNY") Distinguished Professor of History at SUNY at New Paltz, on behalf of the Cayuga; Peter M. Whiteley, Ph.D., a cultural anthropologist, who is a professor at Sarah Lawrence College, on behalf of the U.S.; and Alexander von Gernet, Ph.D., an ethno-historian who is an assistant, non-tenured professor in the Department of Anthropology at the University of Toronto at Mississauga on behalf of the State of New York.[12] Before examining the substance of their testimony, the court has a few comments as to the nature of this proof generally.

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[11] THE HOMER BOOK OF QUOTATIONS, CLASSICAL AND MODERN 902 (Stevenson, Burton eds., 9th ed. 1964).

[12] For convenience, the court will generically refer to these three experts as historians.

Inevitably, as happened here, "disputes about controversial historical questions spill over into arguments about ideological motivation and methodological shortcomings." Daniel A. Farber, *Adjudication of Things Past: Reflections on History as Evidence*, 49 HASTINGS L. J. 1009, 1026 (1998) ("*Reflections on History*"). Thus, in the present case, in an effort to diminish the credibility of opposing historians and to inflate the credibility of their own historians, each of the parties vigorously attacked the ideology and methodology of the opposing historians. This tactic often backfired though because the parties ended up engaging in vitriolic rhetoric, which unfortunately carried over into their post-trial memoranda. What is more, many of these attacks bordered on the petty or trivial, such as the Cayuga's attack on Dr. von Gernet for not seeking tenure. These attacks were ineffective for two reasons. First, they only served to obscure those times when a party did have a legitimate dispute with a particular historian's point of view or methodology. Second, the party engaging in this conduct did nothing to prove or further the objectivity of its own expert historian.

Nonetheless, after reviewing their respective reports and *curriculum vitaes*, listening to their testimony, including how they responded to direct challenges on cross-examination, the court finds that each historian had something of value to offer, and their differing perspectives aided the court in obtaining a more complete picture of the historical events at issue. In fact, as will be seen, the court's findings as to the historical evidence are an amalgam of each of the differing viewpoints of these expert witnesses.

The court recognizes that "the task of any historian . . . is a difficult one: if he [or she] inserts and stresses

material detrimental to the reputation of his [or her] subject he [or she] is inevitably accused of bias in one direction, and if he [or she] omits such material he [or she] is open to the charge of bias in another direction." *In re Long Island R. Co.*, 91 F. Supp. 439, 444 (E.D.N.Y. 1950). In any historical survey there is an "inherent subjective factor involved in the selection of 'significant' facts[.]" *See Hume v. Moore-McCormack Lines*, 121 F.2d 336, 346 (2d Cir. 1941). Recognizing this inherent subjectivity, the court has a few observations about each expert historian which, to a certain extent, bear upon the weight which the court is willing to accord their testimony.

The State ridicules Dr. Hauptman's report for being "a cut-and-paste package of recycled material from articles and books he wrote in other contexts in years gone by." *See* St. Reply at 62, n.32. Tr. at 3851. The court does not criticize Dr. Hauptman's report for its form, as does the State, but the court does question the academic rigor of this report, in part because it contains many broad, rhetorical statements, not all of which find support in this historical record.

As will be more fully discussed below, the court is well aware that complete objectivity or neutrality in recounting these historical events is all but impossible to achieve. Perhaps more so than the other two historians who testified, however, Dr. Hauptman's testimony seemed to be unduly influenced by two areas in which he has conducted extensive research over the years—New York State transportation policies and interests and land speculation vis-a-vis the Iroquois Confederacy. The culmination of this research is Dr. Hauptman's book entitled, "Conspiracy of Interests Iroquois Dispossession and the Rise of New York

State." Notably, the primary focus of this book is what Hauptman deems to be "two key Iroquois nations," the Oneida and the Seneca. *See* Nat. exh. 1 at xvi. The Cayuga, and the 1795 and 1807 transactions in particular, receive only passing mention. In making these observations, the court is not challenging the merits of Dr. Hauptman's scholarship, particularly as reflected in this book. The court is simply pointing out that because his research, especially in recent years, has focused heavily upon transportation interests and land speculation, naturally that is the lens through which he has viewed the historical events at issue in this lawsuit, and his perception of these events has been colored by that lens.

The U.S.' expert historian, Dr. Whiteley, was not without his own bias. As with Dr. Hauptman, the court cannot dispute Dr. Whiteley's credentials. The court is struck, however, by the fact that this is Whiteley's first exposure to eastern land claims, which undisputably raise very different issues and concerns than typically arise in western land disputes, such as those involving the Hopi Indians, with which Dr. Whiteley has had so much first-hand experience.[13] Dr. Whiteley referred to himself as an "objective" historian, Tr. at 3408, who had done "an objective assessment of the historical record[]" in this case. Tr. at 3119. In contrast to Dr. Hauptman in particular, Whiteley was relatively candid in acknowledging the difficulty which any social scientist has in remaining completely neutral. Dr. Whiteley still had a tendency to place a modern

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[13] Not only has Dr. Whiteley written two books pertaining to the Hopi, but he has done extensive field and archival research on the Hopi and their history. *See* Gov. exh. 361 at 1 and 3; St. exh. 723; and Tr. at 3104-19.

construct on these centuries' old events, and to portray the U.S. as the "good guy" and the State as the "bad guy." Given that perspective, it is not surprising that throughout his testimony Whiteley consistently interpreted documents and events in a way which supports that rather simplistic version of the historical events at issue herein.

Insofar as the State's history expert, Dr. von Gernet, is concerned, the court is acutely aware that his version of the historical events at issue admittedly is the "minority" view when compared to the other two testifying historians, as well as when compared to the views of well-recognized scholars in this area such as Dr. Barbara Graymont; and Dr. William Fenton, author of "A Political History of Iroquois Confederacy," and "generally regarded in the academic community as the dean of Iroquois research."[14] Tr. at 4855- 56; *see also* St. exh. 623. While his scholarly views are not as "iconoclastic" as the Cayuga depict them, *see* Cay. Pre-Tr. Memo. at 55, it is fair to say, as Dr. von Gernet himself testified, that "[a]s of September 1999, [he] was the *only* scholar" who had arrived at the opinion that "New York treated the Cayugas fairly in 1795 and

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[14] "Barbara Graymont is a professor of history and has written the authoritative text on the Iroquois and the American Revolution." Tr. at 2970-71. Dr. Fenton is very well regarded in academic circles for his research regarding the Iroquois Confederacy. Dr. Hauptman testified that "without question" Dr. Fenton is "the person who has written [the] most on the Iroquois since 1933 and he, among others is one of the really outstanding scholars in this field." *Id.* at 3939. (Interestingly, even though Dr. von Garnet and Dr. Hauptman are on different sides of this historical debate, von Gernet agreed with Hauptman regarding Fenton's stature as an Iroquois scholar.) Although historians such as Graymont and Fenton did not testify, some of their works are part of this record.

1807[.]" Tr. at 4819-20 (emphasis added). Dr. von Gernet attributed this opinion, which is outside the "mainstream," to the fact that he was "the *only* scholar who had looked into this in any great detail[.]" *Id.* at 4819 (emphasis added). To von Gernet "great detail" meant "look[ing] into the speeches in all of the primary sources[,]" an aspect of Dr. Fenton's research with which von Gernet takes issue. The court is not in a position, nor would it be proper for it to compare the depth of Dr. von Gernet's with that of other historians, especially those, like Fenton, who did not testify. von Gernet's research was thorough, but that does not distinguish it from much of the other historical evidence before the court, including Dr. Whiteley's report. What distinguishes Dr. von Gernet's research here is the conclusions which he reached.

Naturally, each party tried to depict its respective historian as an objective scholar, researcher, and reporter of history. The court is mindful, however, that "[h]istory is not an exact science[;] [it is] more in the nature of an art[.]" *See Hume*, 121 F.2d at 346. Indeed, as one legal scholar has astutely observed, "the very subject matter of history is value loaded[.]" *Reflections on History* at 1028. In fact, "even the greatest believer in objective historical truth must admit that there are limits to historical knowledge." *Id.* at 1027. Practically speaking, "[t]here are limits . . . to the degree of objective truth we can expect to attain. When we seek to interpret documents, ascribe causes, assign probabilities, or reconstruct cultures," all of which the expert historians in this case were asked to do, "we become involved in a complex web of fact and theory, making the establishment of a definitive answer more problematic." *Id.* at 1031 (footnote omitted). Moreover,

it is difficult to be a completely dispassionate historian because we are all humans who understandably view events through the unique lens of our own life experiences. Thus, the historians' opinions expressed during Phase II were necessarily "colored" to a certain extent—colored by their experiences, both personally and professionally, and by the task which they were asked to perform.

Complete objectivity is an unobtainable goal as Dr. von Gernet recognized when he candidly testified that he does not think that it is "ever possible to have complete objectivity in any historical matter, particularly when you're dealing with events so long ago." Tr. at 5241. Nonetheless, in making the following findings as to the historical proof, the court is striving for relative objectivity, recognizing that "[a]s a practical matter, there are some events whose true facts will forever remain debatable because of the ambiguities in the historical record, and some facts whose import will always be subject to conflicting interpretations." *See Reflections on History* at 1027.

The State's view of the events at issue is, in short, that it did no wrong. The State contends that in the years before 1795 and for a time thereafter, it was the Cayuga who wanted to dispose of their land, and the State was simply accommodating them. Characterizing the State's view of history as "parochial and narrow-minded[,]" the Cayuga respond that the State did not act in good faith and in fact, that its policy "toward Indians, including the Cayuga, was characterized by greed, duplicity and racism[.]" Cay. Pre-Tr. Memo. at 37 and 33. Consequently the "relative equities" tip decidedly in their favor, the Cayuga believe.

The U.S. criticizes the State for not only "ignor[ing] the[] damaging historical facts, but [for] rewrit[ing them[,]" U.S. Post-Tr. Memo. at 30; and in so doing "invent[ing] a revisionist, one-sided story that relies on out of context incidents and 'sound bites' and ignores any and all aspects of the historical record inconsistent with its general theory that only the Cayuga and the U.S. can be blamed for the State's illegal actions in 1795 and 1807." U.S. Resp. at 1. Believing that it has taken the proverbial "high road" in its recitation of the record, the U.S. cavalierly responds that "no argument can be made to deny that New York consistently and uniformly acted in bad faith toward the Cayugas for decades leading up to, during, and even after the illegal transactions." U.S. Post-Tr. Memo. at 19. The U.S. goes so far as to assert that "[w]ithin mere generations, the State successfully implemented a plan to rob the Cayuga of the entirety of their age-old homeland." *Id.* The U.S. makes this bold assertion despite the fact that the historical record affirms that the U.S. did little, if anything, to protect or defend the interests of their wards, *i.e.*, the Cayuga, up until 1992 when it intervened on their behalf in this lawsuit.

Without exception, *each* of the parties has to a certain extent overstated and oversimplified their respective versions of "history." In some instances there are legitimate conflicting interpretations of these events. For example, the historical evidence proffered as to the State's good faith, or lack thereof, in its dealings with the Cayuga is at times consistent, at times in conflict, and often not incapable of discernment with any degree of exactitude. The court will attempt, as best it can, to present the parties' respective proffers with the objective of adopting that version of evidence in question

that is best supported by the proof. To the extent possible, the court will rely upon the contemporaneous documents, keeping in mind that interpretations often vary, depending upon one's point of view.

In analyzing the fairness and relative equities, the court cannot simply examine the circumstances immediately surrounding the 1795 and 1807 treaties. During Phase I of this litigation, where the issue was valuing the subject property, the old adage that real estate is "location, location, location," was often-invoked. In a variation on that theme, as each of the historians made abundantly clear (and as is rather self-evident in any event), history is "context, context, context." Therefore, before considering the 1795 and 1807 treaties themselves, it is necessary to examine in some detail the historical backdrop of those treaties.

I. Pre-Revolutionary War

The Cayuga's method of governance; their protocols and their early history of dealings with the State are helpful to an understanding of the context of the 1795 and 1807 treaties. These earlier events can help shed some light on those treaties in terms of expectations and motivations, not just with respect to the Cayuga, but also with respect to the State and the U.S.

In "pre-European times[,]" Gov. exh. 362 at 8 n.1; *see also* Tr. at 4394-95, the Cayuga, along with four other Iroquois based language nations (the Mohawk, the Oneida, the Onondaga and the Seneca), "were part of a confederacy variously known as the Five Nations Iroquois, *Haudenosaunee*, League of the Iroquois, or Iroquois Confederacy." St. exh. 623 at 7; *see also* Gov. exh. 362 at 8, n.1. The Five Nations became the "Six Nations" in the early 18th century when the Tuscarora

joined that confederacy. *See id.; see also* Tr. at 4401; and Tr. at 2842. Prior to the Revolutionary War, Cayuga territory comprised approximately 1700 square miles, spanning from Lake Ontario southward into Pennsylvania. *See* Gov. exh. 436; Tr. at 2841; 2846-47; *see also* Nat. exh. 61 at 6; St. exh. 623 at 7. And in 1771, also prior to the Revolutionary War, there were approximately 1,040 Cayuga in that area. *See* St. exh. 623 at 7.

In 1768, the British Crown and the Six Nations entered into a Treaty, which set the boundaries of the Nations' territory. Tr. at 2843-44; *see also* Gov. exh. 435; Tr. at 4658. That Treaty provided, *inter alia*, that the Six Nations were "the true and absolute [P]roprietors of the [L]ands northwest of a . . . line that subsequently became known as the old line of property." *Id.* at 2843 (internal quotation marks and citation omitted); *see also* Tr. at 3132. In terms of the Cayuga territory in particular, this 1768 Treaty recognized the same because their territory was included within the Six Nations' property boundaries. *See id.* at 2847. The Indians viewed this Treaty as "settl[ing] a permanent boundary between the[y] and whites." Gov. exh. 228 at 260.

In 1777, New York State adopted a Constitution. Stressing that it was "of great importance" to the State's "safety" to "support[] and maintain[]" "peace and amity with the Indians," and also expressing awareness of "frauds too often practiced towards the . . . Indians," Article 37 of that Constitution expressly provided:

> That *no purchases or contracts for the sale of lands* made since the 14th day of October, in the year of

> our Lord one thousand seven hundred and seventy-five, or which may hereafter be made *with or of the said Indians, within the limits of this state, shall be binding on said Indians, or deemed valid, unless made under the authority and with the consent of the legislature of this state.*

See Gov. exh. 491 at 185 (emphasis added). This appears to be a carryover from the second session of New York's Colonial Assembly, held in 1684, which expressly required that "from henceforward noe Purchase of Lands from the Indians shall bee esteemed a good Title without Leave first had and obtained from the Governour." St. exh. 623 at 8 (internal quotations marks and footnote omitted). Dr. von Gernet characterized this Constitution as "provid[ing] for a protectionist philosophy, [while] at the same time a mechanism for alienation which involved the preemption right." Tr. at 4661.

II. American Revolution

In the early stages of the American Revolution the Six Nations remained neutral. *See* Tr. at 2848-49; Nat. exh. 61. at 7; Gov. exh. 362 at 9; and St. exh. 623 at 10; and Tr. at 4484. In 1777, however, the Iroquois policy of military neutrality began to break down. As Anthony Wallace, one of the leading scholars in Iroquois history, *see* Tr. at 3837-38, wrote in his book, "The Death and Rebirth of the Seneca," in the early summer of 1777, British agents formally requested that the Six Nations fight on behalf of the Crown. *See* Gov. exh. 324 at 132. Initially the Six Nations could not come to a consensus as to this request, with some concern being expressed that the Indians should not involve themselves in this "white man's" feud. *See id.* at 133. Even-

tually, though, "[a] majority of the warriors passed a resolution" to support the British. *Id.*

Despite that resolution, the Six Nations did not stay united in their support for Britain. The Cayuga, along with the Seneca, the Onondaga and the Mohawk, continued to side with the British Crown, even after a plea from Congress to join with the Americans. The Oneida and the Tuscarora split the Six Nations' allegiance by supporting the Americans. *See* Gov. exh. 362 at 9; Tr. at 4835; Nat. exh. 61 at 7.

The U.S.' historian, Dr. Whiteley, opined that it is an "oversimplifi[cation]" to characterize "the Cayuga Nation merely as enemies of the Patriots in the Revolutionary War[.]" Gov. exh. 362 at 10. As Dr. Whiteley testified, there is some indication in the record that not all Cayuga were staunch supporters of the British Crown; "evidently [some were] neutral or in sympathy with the Americans." *Id.* at 9; *see also id.* at 10. Even though Dr. Whiteley admitted that he could not name or point "to a historic instance where somebody reported . . . a band of Cayugas . . . fighting alongside American forces[,]" Tr. at 3146, that does not significantly undermine his opinion that perhaps not *all* Cayuga were loyal to the British during the Revolutionary War. It is unrealistic to think that *every member* of any nation is *always* in agreement with the policies of that nation, especially when it comes to war; and certainly these divided loyalties were evident among *other* Iroquois member nations. *See* Gov. exh. 363 at 438- 39; *see also* Tr. at 2850 (emphasis added) ("[W]ithin *all tribes*, the historical record indicates that there was a division of views."). At the end of the day though, the court agrees with the assessment of the State's historian "that there is [in]sufficient evidence to

overturn an academic consensus that the Cayuga were participants in the American Revolution on the British side." Tr. at 4835.

There were a number of significant battles during the American Revolution. Two battles were prominent in the historical proof presented during Phase II—the battle at Wyoming Valley and the Sullivan-Clinton Campaign. The significance of the Wyoming Valley battle as will be seen, lies not so much in what transpired there as the fact that it was a major impetus for the Sullivan-Clinton Campaign.

A. Wyoming Valley

The battle at Wyoming Valley, part of the ongoing battles of the Revolutionary War was "the first major event of the 1778 fighting-season[.]" *See* Gov. exh. 324 at 137. Wyoming Valley was one of "two major and strictly military engagements[]" . . . "during which Iroquois warriors had participated as brothers-in-arms with British troops[.]" *See id.* at 137 and 138. Thus the battle at Wyoming Valley was by no means "primarily or exclusively a Native American battle." Tr. at 4837. Insofar as Cayuga participation at Wyoming Valley is concerned, Dr. von Gernet stated that "[i]n June, 1778 a large party of Cayuga warriors joined Butler's Rangers and other Indians in the devastating assault on the Wyoming Valley in Pennsylvania." St. exh 634 at 10; *see also* Tr. at 4659. Although Dr. von Gernet did not cite a source for this statement, there is corroborating proof in the record that the Cayuga were among those Indians fighting at Wyoming Valley. In her book entitled "The Iroquois in the American Revolution," Graymont indicates that of the Indians who participated at Wyoming Valley, they were "*mostly* of the

Seneca and Cayuga tribes." Gov. exh. 228 at 168 (emphasis added).

The attack by the British and the Iroquois warriors resulted in the Americans retreating, and the battle became a "rout[.]" *See* Gov. exh. 324 at 137. Thereafter, "[t]he settlements in the valley of Wyoming were . . . burned and looted, and most of the inhabitants fled into the mountains." *Id.* The fighting at Wyoming Valley had devastating consequences, *see, e.g.*, Gov. exh. 228 at 172, but it is widely accepted among historians that these events were greatly exaggerated. *See* Tr. at 3592-93. As Dr. von Gernet so astutely observed, "truth is the first casualty of war[,]" and so it was with the Wyoming Valley battle. *See* St. exh. 623 at 10; and Tr. at 4659. Wallace, a leading Iroquois scholar, echoed this sentiment: "[A]lthough there was neither massacre nor torture of prisoners, the fleeing survivors spread lurid tales of atrocities; indeed, Wyoming became a symbol of Indian rapacity." Gov. exh. 324 at 137-38; *see also* Gov. exh. 228 at 172; and Tr. at 3594 ("Almost as soon as the invaders left, the rumors began to fly, magnifying the horrors of the battle and fabricating atrocities."). This depiction of the Wyoming Valley battle as a "massacre" stems, Graymont asserts, because "Whites have always been prone to label any overwhelming Indian victory a massacre and to call any of their own battle triumphs over Indians a great victory." Gov. exh. 228 at 174. Regardless of how it is described, whether in more inflammatory terms as a massacre, or in more innocuous terms as a battle, the record clearly establishes that the British and the Indians, including the Cayuga soundly defeated the Americans at Wyoming Valley. *See id.*

B. Sullivan-Clinton Campaign

The battle at Wyoming Valley was but one of a number of such raids by the Loyalists and the Iroquois warriors which prompted retaliation by the Americans. *See* Gov. exh. 324 at 141 ("The effectiveness of the Iroquois and Tory raiders in laying waste a fifty-to one-hundred-mile belt of frontier land, . . . was by now a matter of major concern to the Continental commanders."). This retaliation took the form of what is known as the Sullivan-Clinton Campaign, after its two military leaders. In an effort to show that it acted in good faith, the State attempts to depict that Campaign as exclusively an operation of the U.S. asserting that "[t]he physical displacement of the Cayuga from their homeland *was not at the hands of New York*, but the plaintiff-intervenor U.S." *See* State Pre-Tr. Memo. at 2 (emphasis added). The State further asserts that "[s]uch displacement was the direct consequence of the Cayugas' acts of war against the U.S., and it was achieved by [*U.S.*] military forces carrying out [*U.S.*] policy at the *express direction* of *George Washington.*" *Id.* (emphasis added). Consistent with this view, the State takes the U.S. to task for making the "amazing assertion that the Sullivan Campaign was really a New York State action because it was 'instigated' by Governor George Clinton." State Post-Tr. at 3 (citations omitted). In its attempt to distance itself from the Sullivan-Clinton Campaign, the State makes its own "amazing assertion" that that Campaign was solely within the powers of the U.S. Close examination of the record demonstrates that the State has oversimplified history.[15] The Sullivan-Clinton Campaign was *not*

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[15] As usual, the State is not the only party to oversimplify or overstate history here. In his report, Dr. Whiteley asserts that "The Sullivan-Clinton Campaign moved in to annihilate the

exclusively an enterprise of the U.S. or of the State of New York. Each had an integral role in that Campaign. As Dr. Whiteley testified, and as documents found in New York State's Division of Archives and History establish, the U.S. is asserting "that New York was involved in promoting the campaign." Tr. at 2857. Such promotion does not render the Sullivan-Clinton Campaign solely a New York State action, and the historical record belies that view. The Sullivan-Clinton Campaign was a joint effort between the U.S. and several states, one of which was New York.

The Sullivan-Clinton Campaign came about in part because in the aftermath of Wyoming Valley and other similar victories by the British and their Indian allies, "the appeals of the menaced patriots to Governor George Clinton, to the New York Legislature, to Washington and to Congress for protection became piteously insistent." *See* Gov. exh. 417 at 9. Consequently, "Clinton promised that he would do everything within his power for the protection and the comfort of the frontiersmen." Tr. at 2856 (internal quotation marks omitted). Although Clinton "advised a winter attack on the Indian strongholds[,] . . . that suggestion did not materialize, [but] the correspondence of Washington shows that he devoted a great deal of attention to the 'Indian expedition' during the winter and spring of 1778-79." *Id.*

On February 25, 1779, Congress voted to authorize "Washington's plan for the 'Indian expedition[,]'" and it appropriated "nearly a million dollars for equipment and supplies[.]" Gov. exh. 417 at 9 and 12. Washington

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Cayuga." Gov. exh. 362 at 10. As set forth above, however, that Campaign was not directed exclusively at the Cayuga.

appointed General John Sullivan to lead the Campaign. *See id.* at 9. "General James Clinton, the brother of [New York] Governor George Clinton, was regarded as second in command, and was given direct charge of the army which was assembled in New York[.]" *Id.* at 9-10; *see also* St. exh 623 at 10. For its part, "[o]n March 13, 1779, the Legislature of New York ordered 1000 men to be recruited to defend the frontier, and forts to be erected." *Id.* Significantly, New York was not the only state to lend its support to this cause. "Officers and soldiers participated from . . . Pennsylvania, New Jersey, New Hampshire and Massachusetts." *Id.* at 12. Thus, the Sullivan-Clinton Campaign was a collaborative effort between the fledgling American government and several states, including New York. Not only does the historical evidence before the record establish this, but common sense dictates that it would have been practically impossible for any of these neophyte governments to have singlehandedly mounted what has been called "one of the largest offensive movements in the whole War of Independence." *See* Gov. exh. 417 at 12.

Under George Washington's organization, there were four parts to the Sullivan-Clinton Campaign plan. *See* Gov. exh. 417 at 10. Two of those parts related directly to the Cayuga. The strategy behind the opening of that Campaign in the spring of 1779 was to "permit the leaders . . . to devote all their attention to the Cayugas and Senecas." *Id.* at 12. Then, during "[t]he main body of the expedition under General Sullivan[,]" the Continental troops were to "move up into the Cayuga and Seneca territory[]" in anticipation of breaking the power of those two nations. *See id.* Broadly stated, the purpose of this Campaign was to

"attack and destroy the Iroquois enemies in their homeland, to destroy as many towns and the resources of those towns as possible and thereby deal a very powerful blow against the British and their most significant allies." Tr. at 2852 and 2854. Dr. Whiteley's interpretation of the purpose of the Sullivan-Clinton Campaign is borne out by the writings of Washington himself. In "instructions" to Major-General Sullivan, in late spring of 1779, Washington wrote:

> The expedition you are appointed to command is to be directed against the hostile tribes of the Six Nations of Indians, with their associates and adherents. The *immediate objects* are the *total destruction and devastation of their settlements*, and the capture of as many prisoners of every age and sex as possible. It will be essential to ruin their crops now in the ground & prevent their planting more[.]

St. exh. 725 at 460; *see also* Tr. at 3157-58 (emphasis added).

Washington's objectives were achieved. Prior to the Sullivan-Clinton Campaign, the Cayuga practiced a "mixed economy," consisting of "agriculture, hunting[,] . . . gathering[,] . . . fishing, and a pastoral economy." Tr. at 2860. The Sullivan-Clinton Campaign "completely destroyed" that economy. *Id.; see also* Gov. exh. 417 at 15-16 ("The hostile Senecas and Cayugas were terribly punished. Their homes were burned, their vast cornfields and gardens were all destroyed, and their orchards were cut down or killed."). As military journals from the time show, a number of Cayuga villages on the east and west sides of Cayuga Lake also were destroyed. *See generally* Gov. exh. 422;

and Tr. at 2861-2864; *see also* Nat. exh. 61 at 7; Gov. exh. 324 at 143 and 144 ("[S]ullivan's army . . . succeeded in laying waste [to] . . . all the main Cayuga settlements[.]" "[W]ith the conclusion of the summer of 1779, . . . Cayuga towns had all been destroyed or abandoned[.]") The destruction of the Cayuga's villages and resources was devastating, "fundamentally displac[ing] [the Cayuga] from their homes." *See* Tr. at 2870. Indeed, "the majority of the Cayugas never returned to Cayuga Lake to live[,]" and "although the figures aren't as complete as one would like[,] . . . Wallace, . . . , records that the Six Nations population declined by half from immediately prior to the Revolutionary War to the early 1790s." *Id.* at 2870 and 2871.

The court does not credit the State's argument that it had little or no role in the Sullivan-Clinton Campaign, and thus the State acted in good faith at that time. Nor does the court credit State's implied argument that the Sullivan-Clinton Campaign was somehow justified by the atrocities which preceded it at Wyoming Valley, and other similar battles where the British and Iroquois prevailed over the Americans. Wyoming Valley and the Sullivan-Clinton Campaign demonstrate nothing more that then, as now, warfare is brutal and can have devastating consequences for all concerned. Furthermore, the court cannot overlook the fact that these battles were part of a larger picture—the Americans' efforts to defeat the British in the War for Independence.

C. Articles of Confederation

In 1781 the states adopted the Articles of Confederation. *See* Gov. exh. 362 at 14; Gov. exh. 362 at 267; and Tr. at 2872. One clause of Article IX gives

Congress "the sole and exclusive right and power of determining peace and war" and of "entering into treaties and alliances." Gov. exh. 228 at 268 (citation omitted). Clause four of that same Article also gives Congress "the exclusive right of 'regulating the trade and managing all affairs with the Indians, not members of any of the states, *provided that the legislative right of any state within its own limits be not infringed or violated.*'" *Id.* (emphasis added). In what a former Assistant Attorney General for New York, describes as "two-faced" language, Gov. exh. 438 at 24, "[t]he Articles of Confederation [thus] left the question of jurisdiction [over Indian affairs] up in the air." Gov. exh. 218 at 604. Graymont identifies the constitutional issues raised by the inherent tension between the two clauses quoted above: "Were the Iroquois to be considered members of New York State: And what did the term 'members of any states' mean?" *See* Gov. exh. 228 at 268.

Dr. von Gernet declined to "enter[] into this fray," as to "how the Indian-related clauses in the Articles of Confederation should be interpreted." St. exh. 623 at 15 n. 41. When Whiteley was questioned as to his interpretation of the Articles of Confederation he took the position that Congress had the *sole* right to negotiate Indian treaties thereunder. *See* Tr. at 3138-39. Suffice it to say for present purposes that the issue of New York's treaty making activities at the time "was one of great complexity and delicacy, involving the matter of states rights versus federal powers." *See id.* at 269. As will be seen, New York's governor, George Clinton, clearly aligned himself with the anti- federalists-those favoring, *inter alia*, state jurisdiction over the Indians, believing them to be "members" of New York State. *See* Tr. at 3167-69; and Gov. exh. 218 at 604. Clinton

"wanted to retain control over Indian affairs within the state." *Id.* at 3170. The federalists, on the other hand, advocated centralized control over Indian affairs by the new confederal government.

Given these differing interpretations to the Articles of Confederation, arguably it was reasonable, at least at this particular juncture, for New York to believe that it was permissible for it to deal in land matters with the Cayuga to the exclusion of the Federal Government. Indeed, some 200 years thereafter, this court held, in an opinion affirmed by the Second Circuit Court of Appeals, that Article IX, Clause IV of the Articles of Confederation gave the states the power to purchase Indian land within their borders and extinguish Indian title to such land so long as such activity did not interfere with Congress's paramount powers over war and peace with the Indians. *See Oneida Indian Nation of New York v. New York*, 649 F. Supp. 420 (N.D.N.Y. 1986) (McCurn, J.), *aff'd* 860 F.2d 1145, 1154 (2d Cir. 1988).

D. Cayuga Factions

During and after the American Revolution the Cayuga dispersed producing roughly three separate enclaves. *See* Nat. exh. 61 at 8. The first faction, which the court will refer to as the "Buffalo Creek Cayuga" or the "Cayuga majority," was led by Cayuga Chief Fish Carrier, who was the "principal spokesperson" for that Cayuga. *See* St. exh. 623 at 21(footnote omitted); Tr. at 2896. After the War, Fish Carrier along with "many other Cayuga chose to settle south of Fort Niagara at Buffalo Creek where they associated themselves with a large Seneca community." St. exh. 623 at 20; and Tr. at 4671-72. The second group, referred to by von Gernet as a "splinter group," was led by Steel Trap until his death in 1794. *See* St. exh. 623 at 21. Like Fish Carrier,

Steel Trap fled to Niagara after the Sullivan-Clinton Campaign; but unlike Fish Carrier, Steel Trap returned to the eastern side of Cayuga Lake after the war. *See id.; see also* Tr. at 4672. The court will refer to this group as the "Cayuga Lake faction," or the "Cayuga minority." A third group fled to Canada after the war, residing on the Six Nations reserve which the British established. *See* Nat. exh. 61 at 8; and Tr. at 2895.

The majority and minority Cayuga factions had diverse interests. Fish Carrier and the Cayuga majority were "determined to dispose" of their former homelands, whereas Steel Trap and the Cayuga minority "wanted to maintain at least some of those homelands as territories where they would continue to live, and he was interested in . . . encouraging the Cayuga Nation to return to th[os]e homelands." *See* Tr. at 4673. It is these divergent interests which, in part, contributed to confusion in later years as to the intent of the Cayuga Nation as a whole with respect to their lands.

E. 1784 Fort Stanwix Treaties

In 1783 a general peace accord Treaty was reached between the U.S. and Britain, The Treaty of Paris, ending the American Revolution. *See* Tr. at 3166-67. That Treaty did not address the status of the Iroquois post-war, however, *see id.* at 3167; and Tr. at 4674, leaving the U.S. and individual states to each attempt to exert their authority over Indian Nations, such as the Cayuga.

Peace efforts in the aftermath of the American Revolution included two separate treaties both entered into at Fort Stanwix in 1784-New York instigated one of those treaties, and the Federal Government the other. Given the inherent tension in the Articles of

Confederation, in 1783 Congress was preparing to exercise its "exclusive" right to manage Indian affairs under the Indian Commerce Clause by entering into a peace treaty, which included land cessions with the Six Nations. *See* Gov. exh. 438 at 24; *see also* Tr. at 3226. Even though the State and the Federal Government were each proceeding in accordance with the Articles of Confederation, there was an undeniable tension between those two governments.

New York was motivated not only by trying to achieve peace with the Six Nations, but also because it was in competition with other states such as Massachusetts and Connecticut for land within its borders. *See* Gov. exh. 438 at 24-25; Tr. at 2873; 3225; and 3227-28; and Gov. exh. 362 at 14. Just after the Revolutionary War there was also "a tide of land speculators who formed companies to try and acquire large tracts of land in the area." Tr. at 2873. Thus, insofar as the State was concerned, its "*primary object*, . . . was not only to conclude a peace but to *obtain a land cession*." Gov. exh. 228 at 267 (footnote omitted) (emphasis added). The U.S., on the other hand, while also motivated to make peace with the Six Nations, *see* Gov. exh. 228 at 266, was concerned with, among other things "extinguish[ing] Indian title, including any claims held by the Iroquois tribes of New York[,]" and "punish[ing] the hostile tribes [of which the Cayuga was one][.]" Gov. exh. 211 at 55. Another concern of the U.S. was the possibility of another Indian war "if the . . . State of New York should insist upon expelling the Six Nations from all the country they inhabited previous to the [Revolutionary] war, within their territory[.]" Gov. exh. 438 at 46 (internal quotation marks and citations omitted); *see* also Tr. at 2879 and 2880-81. Thus, while

the State at this juncture was motivated more by a desire to acquire Indian lands, the motivation of the U.S. was more political in nature. Given these differing objectives, and also because of the newness of the Republic, the State and the confederal governments each sought to independently negotiate peace with the Indians following the American Revolution.

Because "New York . . . was a step or two ahead of Congress, . . . , and, concerned for its own interests," it was the first to enter into a Treaty with the Indians at Fort Stanwix in 1784. *See* Gov. exh. 228 at 267; *see also* Tr. at 4890-91. The State met with representatives of "the five core members of the Iroquois Confederacy." Tr. at 4959. Even though the State was interested in land cessions, it was unable to procure any. *See* Gov. exh. 211 at 53; *see also* Gov. exh. 363 at 449 ("[N]o land had passed out of the possession of the Indians, as Clinton had hoped."). Nor was the State able to obtain recognition of its sovereignty. *See* Gov. exh. 211 at 53. Instead, the State's Treaty simply "re-established some terms of peace and provided for the possibility of commerce[.]" *See* Tr. at 3223.

The second Fort Stanwix Treaty of 1784 was between the U.S. and the Six Nations. *See* St. exh. 727. Like the State Treaty, this Treaty too was an effort to make peace with the Six Nations following the American Revolution. *See* Tr. at 2871. But unlike the State Treaty, this confederal Treaty involved a cession of "[p]robably millions of acres of land." Tr. at 3238. More specifically, the "principal" term of this Treaty "involved a cession of lands west of Lake Erie and south of the Pennsylvania line, to the U.S., in return for which the U.S. recognized Iroquois possession of their lands in

what became New York State." *Id.* at 2871-72; *see also* Tr. at 4888.

New York's Governor Clinton was invited to participate in this federal Treaty, but he refused. *See* Tr. at 3172; Tr. at 5364-65; and Tr. at 2883. Despite the fact that the State refused to formally participate in the confederal Treaty negotiations, it had a presence there. To further its own interests, in September, 1784, Governor Clinton instructed Major Peter Schuyler and Peter Ryckman to remain behind after the State negotiations at Fort Stanwix to "observe the Conduct of the Commissioners of Congress in their proposed Treaty," and to discern the U.S.' objectives. Clinton further instructed Schuyler and Ryckman to "*use* [their] *most undivided influence to Counteract and frustrate*[] any actions by the U.S." which "may [e]ventually proved [d]etrimental to [it.]" *See* Gov. exh. 425 at 379 (emphasis added); *see also* Tr. at 2884-85. In response the U.S. posted sentinels. *See* Tr. at 2885; and Tr. at 4892-93. As historian Graymont so aptly wrote, this is one "graphic example of the . . . rivalries and jealousies between the states and the Congress in the early years of the Republic." Gov. exh. 228 at 272 (footnote omitted); and Tr. at 4892.

The U.S. attributes bad faith, or at the very least a lack of good faith, to the State in connection with the U.S.' Fort Stanwix Treaty because purportedly New York "wanted to expel the Cayuga," and it "attempt-[ed] to '[c]ounteract and [f]rustrate' Congress' peace Treaty." U.S. Post-Tr. Memo. at 21. In an effort to demonstrate its good faith, the State responds by criticizing the U.S. for its method of treaty making, asserting that the U.S. was "arrogant" in its treatment of the Iroquois at Fort Stanwix because supposedly it "dis-

pensed with customary diplomatic protocols and sought to impose upon the defeated tribes (including the Cayuga) the [U.S.]' terms of peace." St. Post-Tr. Memo. at 8; and St. Pre-Tr. Memo. at 3. The court will address these arguments in reverse order.

There was an abundance of testimony, especially from Dr. von Gernet, regarding the contrasting negotiation styles of the state and confederal governments at Fort Stanwix. von Gernet depicts the U.S. as adopting an "uncompromising" tone. *See* Tr. at 4887; *see also* Tr. at 4665. In contrast, von Gernet characterized Clinton's style as one of "rekindl[ing] forest diplomacy[,]" by "allud[ing] to all of the typical Iroquois metaphors that ha[d] become part of the standard parlance of the time[,]" such as "nation . . . council fire or . . . brethren, sachems, [and] warriors." *Id.* at 4663-65. Clinton also "reminded the Iroquois of the long-standing relationship that they had with one another that preceded the Revolution by well over a century, and he stressed the state's preemption right and basically asked the Iroquois to abide by this 'ancient rule and custom.'" *Id.* at 4666; *see also* Gov. exh. 375 at 115. The issue of this undisputed difference in negotiating styles, which the State raises, does not bear directly on the issue of its good faith. The State's good faith cannot be determined simply by showing that it acted at least partially in accordance with Iroquois protocols and the U.S. did not. The State's method of negotiating, as a basis for finding good faith, is further weakened by record evidence that even assuming those protocols were strictly adhered to prior to the American Revolution (a highly doubtful supposition), after the war, that was not the case.

Likewise, the court is unwilling to find bad faith on the part of New York simply because at the end of the Revolutionary War its interests were antithetical to those of the U.S. And although Governor Clinton did instruct Schuyler and Ryckman to "frustrate[]" the Congressional Treaty, that in and of itself does not support a finding of bad faith, especially considering that in the end the State was not successful in thwarting the U.S.' treaty efforts. After all, the U.S. obtained a significant land cession from the Iroquois without paying any consideration. The actions of the State and confederal governments before and during the Fort Stanwix treaties amounted, in this court's opinion, to nothing more than those governments each trying to assert their respective sovereignty muscles over the Iroquois-a theme which was to occur in the years follow.

F. Livingston Lease

Evidently in an effort to circumvent the New York State Constitution,[16] which required that any "pur-

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[16] Dr. Whiteley expressly disagreed "that the Livingston lease was an effort to end run around the New York's constitutional prohibition against sales of Indian lands to private parties[,]" Tr. at 3247. The historical consensus which can be drawn from the present record is to the contrary, however. One historian has commented that the Livingston Lease was a "[s]cheme devised to evade the Letter of the fundamental Law [the 1777 New York Constitution], while it defeated its Spirit." *See* St. exh. 35 at 119 n. 1. Historian Graymont concurred: "The purpose of the 999 year lease of the Genesee Company was to circumvent the provision of the state constitution which forbade private purchase of Indian lands without express license from the Legislature." Gov. exh. 363 at 457 (footnote omitted). Dr. von Gernet expressed the same view. *See* Tr. at 4677 ("It seems clear that the New York Genesee Company of Adventurers tried to circumvent the constitutional

chase[] or contract[]" for the sale of Indian lands be "made under the authority and with the consent of the [state] legislature[,]" *see* Gov. exh. 491 at 185, in 1787 a group of private individuals entered into a 999 year lease, known as the Livingston Lease, with the Six Nations. *See* St. exh. 35 at 120-22. The Livingston Lease "ceded *all* of the [Iroquois] lands . . . west of the old line of property in New York State except those lands that the sachems and chiefs chose to reserve." *Id.* at 2888 (emphasis added); *see also* Tr. at 3308 and St. exh. 623. Those who entered into that Lease were land speculators operating as the New York Genesee Company of Adventurers ("Genesee Company"). Among the prominent members of that group were a former Commissioner of Indian Treaties, a New York State Senator, and numerous past, present and future State Assembly members. *See* Gov. exh. 324 at 153; and St. exh. 35 at 120; *see also* Tr. at 2889; and Gov. exh. 362 at 21. Indeed, Peter Ryckman, one of those instructed by Clinton to frustrate the 1784 Congressional Treaty at Fort Stanwix, was one of the principals in the Genesee Company. *See* Tr. at 2895.

The Livingston Lease purports to be with "the Chiefs or Sachems of the Six Nations[,]" but actually only four member Nations were signatories, one of which was the Cayuga under Fish Carrier's leadership. *See* St. exh. 35 at 120 and 122. The Cayuga Lake minority, under Steel Trap's leadership, did not agree to this lease. *See* Tr. at 2909; and Tr. at 3358. According to the State's historian, the Cayuga majority was motivated to agree to the terms of this Livingston Lease because they "regarded this as part of their long-term

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requirement that sales not proceed with private parties . . . by making it a 999-year lease for ten centuries[.]").

goal to convert their former territories into a source of revenue[.]" Tr. at 4678. Not completely inconsistent with this view, the U.S.' historian testified that the Cayuga were willing to enter into this lease because they were in "desperate straits and they needed any sort of economic support they could get." Tr. at 2887; and Gov. exh. 362. Under the terms of the Livingston Lease the signatory Nations were to receive "an annual rent or . . . annuity, [which] would have been a source of income in very difficult circumstances." *Id.* The total of this annuity was $2,000, St. exh. 35 at 121 n. 1; and Tr. at 3257; and assuming that it was divided evenly among the four signatory Nations, "at the very most, each one would [have] be[en] entitled to $500[.]" Tr. at 466-67.

The State of New York was *not* a party to the Livingston Lease. Moreover, none of the Genesee Company individuals were acting on behalf of the State when they entered into that lease. *See* Tr. at 3243. Despite the State's lack of participation in that Lease, the Cayuga majority perceived the Genesee Company as "legitimate representatives of the [S]tate[.]" *See* Tr. at 2889. Fish Carrier explained to Governor Clinton[17] that the Cayuga majority "doubted . . . the [p]ropriety of [proposals by the Genesee Company]," because the majority suspected that those proposals were contrary both to the State law and to the Cayuga's ancient customs. *See* St. exh. 35 at 415; and Tr. at 4915-17. The majority's concerns were allayed, however, by assurances from the Genesee Company that the Governor

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[17] Joseph Brant "was one of very few Iroquois individuals who received an education and was a fluent speaker of English and fluent reader and writer of English." Tr. at 2905. He corresponded with Governor Clinton on behalf of Fish Carrier and the Cayuga majority.

and other "Chiefs of State had 'authorized' this lease proposal to the Cayuga." *See id.* "[I]nduced" into believing the Genesee Company, the Cayuga majority agreed to the Livingston Lease, not believing that they were doing anything "wrong" or "disagreeable" to the State. *Id.* at 415-16. The Cayuga were also "induce[d]" into entering into the Livingston Lease because they were under the impression that unless they agreed to that Lease, the State would cede all the Cayuga land to others with no payment in return. *See* St. exh. 35 at 416-17; *see also* Tr. at 5233.

After execution of the Livingston Lease, the Genesee Company sought ratification by the Legislature, but it refused.[18] *See* Tr. at 3248. The State quashed the Livingston Lease for several reasons. First, the State believed that that Lease violated the State's right of preemption which gave the State the first right of refusal or to purchase Indian lands. *See id.* at 2890-91; and 2910; and Tr. at 4913. Further, the State believed that the Livingston Lease violated the New York State Constitution, which implicitly proscribed such private leases. *Id.* at 4913. Also, the State was concerned about a secessionist movement by the Genesee Company. *See* Tr. at 2890-9; and 2910; and Tr. at 4918. Besides quashing the Livingston Lease on March 17, 1788, the State Legislature enacted a statute to punish "infractions" of Article 37 of the New York State Constitution which prohibited purchase of Indian lands without the Legis-

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[18] To this point the court has referred to only one Livingston Lease. Actually there were two. After New York invalidated the original Livingston Lease, the Six Nations, including Fish Carrier and a number of other Cayuga, entered into a modified version of that original Lease, which the legislature also refused to ratify. *See* St. exh. 623 at 23; and Tr. at 4678-79.

lature's approval. *See* St. exh. 35 at 438-440 n. 1; and Tr. at 3249-50.

Not surprisingly, the import of the Livingston Lease is vastly different depending upon which of the parties is viewing it. The Cayuga assert that the Livingston Lease was significant "because it is the first of many instances in which the Iroquois, including the Cayuga, sought to give a lease, as opposed to an outright surrender of title, in exchange for funds to sustain their people." Cay. Post-Tr. Memo. at 35. Further, the Cayuga assert that the lease "presages the recurring refusal of the State to refuse to consider any arrangement that would permit the Iroquois to retain title to their lands." *Id.* In a similar vein, the U.S. contends that the Livingston Lease is important to understanding the context of the 1795 and 1807 treaties because it "set the standards for State attempts to acquire cessions of Iroquois lands." *See* U.S. Pre-Tr. Memo at 3; and U.S. Post-Tr. Memo. at 21; and Gov. exh. 362 at 22 and 23.

Instead of focusing on the motivation of the private individuals, the State paints the Livingston Lease as an effort by the Cayuga "to skirt" New York's Constitution and "dispose of all of their lands through 999-year leases for less consideration than they could later receive from New York in 1789 and 1795." St. Pre-Tr. Memo. at 4. Somewhat ironically, the State then goes on to assert that in effect, by quashing this Lease, the State was protecting the Cayuga from themselves: "*Only by virtue of New York's intervention* were the private speculators and the Cayuga foiled in their efforts to alienate all of their lands in New York." *Id.* (emphasis added). New York's motivation was not altogether altruistic. Less than a month after quashing the Livingston Lease, "in reaction to what was going on

in the previous months[,]" including that Lease, the State enacted a statute appointing commissioners to enter into treaties with the Six Nations. Tr. at 4922; *see also* Tr. at 2891.

G. 1789 Treaty at Albany

In July, 1788, New York ratified the U.S. Constitution which gives Congress the sole right to enter into treaties. Article I, § 10, ¶ 1 of the Constitution expressly provides: "*No State* shall enter into any Treaty, Alliance, or Confederation[.]" *See* Gov. exh. 363 at 458 (internal quotation marks and citation omitted) (emphasis added). "And Article II, Section 2, Paragraph 2 specifically grants the Treaty making power to the President of the [U.S.], by and with the Advice and Consent of the Senate." *Id.* Ignoring this unequivocal language, the State forged ahead on its own in 1788 and 1789, making several treaties with various constituents of the Six Nations, including the Cayuga. *See id.* at 458-60.

In September 1788, through two separate treaties, the State obtained "major land cessions" from the Oneida and the Onondaga. *Id.* at 459. As will be seen, there are striking similarities between those treaties and the one which the State later entered into with the Cayuga in February 1789. As with the Cayuga, relatively small Reservations were set aside for the Oneida and the Onondaga, and each received some compensation plus an annuity. *See id.* Also as with the Cayuga, the State dealt with the minority factions of the Onondaga and Oneida. *See* Tr. at 2899.

The State and the U.S. agree that it is necessary to explore in some detail the 1789 New York Treaty with the Cayuga at Albany because this Treaty "provide[s] the most central background of all for an understanding

of the Treaty of Cayuga Ferry in 1795, and for the purchase of remaining Cayuga lands in 1807[]"—the two transactions are at the heart of this litigation.

The 1789 Treaty of Albany was relatively short, containing only five paragraphs, and its terms were fairly straightforward. In the first decretal paragraph it succinctly stated that "[t]he Cayugas do cede and grant *all* their lands to the People of the State of New York forever." St. exh. 728 at 216, ¶ 1 (emphasis added). This cession represented approximately 1600 square miles. *See* Tr. at 2893. The 1789 Treaty allowed the Cayuga to retain a portion of this land, however, "for their own use and cultivation but not to be sold, leased or in any other manner aliened or disposed of to others[.]" *Id.* at 216, ¶ 2. This portion is roughly 64,000 acres, or about 100 square miles, located at the north end of Cayuga Lake, and it is the subject of this lawsuit. *See* Tr. at 2892-93.

In consideration for this land cession, the State agreed to pay the Cayuga "five hundred dollars in Silver," payable at that time; an additional $1,625.00 payable the following year; and an annual payment of "five hundred dollars in silver[]" in "posterity forever[.]" *See* St. exh. 728 at 217, ¶ 4. The Cayuga could elect, however, to receive all or part of the annuity payment in the form of "clothing or provisions[,]" *see id.* which, according to Whiteley indicates that the Cayuga Lake faction was very bad off economically "and willing to treat for the cession of their lands in order to sustain themselves." Tr. at 2893.

As "further consideration" the State granted to the Cayuga's "adopted child Peter Ryckman," *inter alia*, a one mile square tract of land located within the area reserved to the Cayuga. *See id.* at 217, ¶ 4; *see also* Tr. at

2895. This is the same Peter Ryckman who was one of the principals in the Livingston Lease, and who was instructed by Governor Clinton to "frustrate" the 1784 Congressional Treaty at Fort Stanwix. Although Ryckman was mentioned by name in the Treaty, other settlers who were not named therein also were permitted to remain on the Reservation after the 1789 Treaty. John Richardson, "who had direct ties to the Genesee Company[,]" and who was "one of the State's four Commissioners at the Treaty of Cayuga Ferry in 1795," and others with a connection to Richardson and the Livingston lessees also were allowed to settle on the Reservation. *See* Gov. exh. 362 at 29 and 30. Seemingly at odds with allowing settlers to remain on Cayuga lands, in this Treaty the State pledged that it would protect the Cayuga on the Reservation from encroachment. *See* St. exh. 728 at 217-18, ¶ 5; *see also* Tr. at 2899-2900.

The 1789 Treaty negotiations took place at Denniston's Tavern in Albany. *See* Tr. at 2892; and St. exh. 35 at 272. The Treaty was between the State and the Cayuga Lake, or minority faction, led by Steel Trap. *See* Tr. at 2897 and 2909; and Tr. at 3250. Although invited, the Cayuga majority from Buffalo Creek was *not* present and did not participate in those negotiations.

The documents which provide the most helpful understanding of the 1789 Treaty negotiations and their repercussions are several letters between Governor Clinton and various Five Nation Chiefs, and recorded speeches of the Cayuga Lake faction. Obviously there is no way for the court to gain first-hand knowledge of these ancient Treaty negotiations; nonetheless, the court finds these documents to be particularly compelling evidence of what transpired in terms of the 1789 Treaty.

In a June 2, 1789, letter, the Buffalo Creek Cayuga leader, along with others, advised Governor Clinton that they were aware of "the Purchases," *i.e.* the 1789 Treaty with the Cayuga Lake faction, and they expressed concern that the "[i]ndividuals" who entered into the treaty earlier that year were "*without Authority*" to do so. *See* St. exh. 35 at 331 (emphasis added); *see also* Tr. at 2898. That letter further states: "We did not expect that you, after advising us to shun private Treaties with Individuals and avoid selling our Lands to your disobedient [sic] Children, . . . would yourself purchase Lands from a few of our wrong headed young Men, without the Consent or even the Knowledge of the Chiefs[.]" *See id.;* and Tr. at 2902-03. The court concurs with Dr. Whiteley's interpretation that these few "wrong headed young Men" refer to the Steel Trap minority from Cayuga Lake. *See* Tr. at 2903. It is less clear from the context, however, that, the reference to "Chiefs" means "the properly instituted chiefs of the Six Nations[,]" Tr. at 2903, but the fact that that letter was signed by representatives from the Onondaga, Cayuga, Seneca and Mohawk Nations is supportive of this view. *See* St. exh. 35 at 331-32. In any event, despite those apprehensions about the manner in which the State negotiated the 1789 Treaty, the Chiefs go on to state that they do *not* "have any Objections to [Governor Clinton] . . . having the Lands[,]" but the majority faction wants what it perceives to be its "fair share" of the monies to be paid thereunder. *See id.* at 331.

In direct response to that June 2nd letter, on July 14, 1789, Governor Clinton first expressed concern that the 1789 Treaty "should create any Uneasiness in your Minds[.]" *Id.* at 336. The Governor then explained that prior to the negotiation of the 1789 Treaty,

"[i]nvitations were . . . sent agreeable to ancient Usage, to the *different Nations* [.]" *Id.* (emphasis added). When "some of the Nations" could not attend at the proposed time, the meeting was postponed and "Notice [given] to our Brethern." *Id.* The Onondaga and Oneida attended, but even after "many [d]ays" the Cayuga did not show up. *Id.* Before leaving, according to Clinton, "[i]nvitations" were "again" sent to the Cayuga "to attend at a Council Fire which we purposed [sic] to kindle at this Place in the Winter." *Id.* at 337. Clinton wrote, "[t]he Cayugas accordingly came, and the same Reasons which influenced our Treaties with the Oneidas & Onondagas, produced a similar Agreement with us and the Cayugas for their Lands." *Id.* Next, responding to the Cayuga majority's complaint about not receiving any of the Treaty funds, Clinton indicated that he had advised "[d]istribution of the Money among those of their Nation who are intitled [sic] to it, as is consistent with Justice and the Usage among the Indian Nations." *Id.*

The Cayuga majority was not the only faction dissatisfied with the 1789 Treaty. Following directly on the heels of the majority's June 2nd letter to Clinton, on June 3, 1789 Steel Trap, the Cayuga minority spokesperson, delivered a speech to the Governor wherein he implored Clinton to keep his pledge under the 1789 Treaty to prevent encroachment onto the Reservation by outsiders. *See* St. exh. 35 at 325. In that speech, Steel Trap also reminded Clinton that Clinton had "[[p]romised]" the Cayuga Lake minority that he would enlarge "[their] Reserve." *Id.* at 326. Steel Trap wanted a larger Reservation in anticipation of the Buffalo Creek faction returning to Cayuga Lake. *See* Tr. at 4684.

Not satisfied with Clinton's July 14th response, the Cayuga majority and others sent a second letter to him dated July 30, 1789. This letter was signed by Fish Carrier, along with nine other majority Chiefs, as well as various other Nation Chiefs. The Chiefs advised Clinton that they had "endeavored to explain to [him] that [he] had not treated with the Chiefs, nor with Persons authorised by them to dispose of [their] Country[.]" St. exh. 35 at 340. The Chiefs further expressed that they were "now sorry to find [Clinton] did not wish to be convinced of an Error, which [he] took no previous Steps to avoid." *Id.* at 340.

The Chiefs then directly challenged Clinton's view that the 1789 Treaty "gave great satisfaction to the Indians and would be much to their Advantage[:]"

> Undoubtedly a large Sum of Money to a few Indians, *void of Principal*, would be pleasing, and their Ideas of Advantage are but momentary and never discend to Posterity, and they are too blind to see the Traps laid to disunite the Nations to which they belong. What you mean by offering your Assistance to see the Money fairly divided among those of their Nations who are entitled to receive it, we do not understand, unless you think none entitled to it but those who remain in the reserved *Trap* and who are entirely in your Power. Our Ancestors made no Distinction in a Nation; they held their Lands in common, and we do not wish to deviate from their Customs.

Id. (emphasis in original). Again the majority attacked Clinton for dealing with the minority Cayuga Lake faction:

> [I]t was not the Custom of our Ancestors to call a Council and treat on Business of importance to their Nations and Posterity, without the presence or Knowledge of the Chiefs, nor was it the Custom of yours to require it; therefore we now see clearly what we before had only a glimmering View of, and that your solemn Deliberations were the dictates of Policy and *your Determination was to effect a Disunion, which would terminate in our Ruin.*

Id. at 341 (emphasis added).

Despite their bitter complaints that the State had improperly dealt with the Cayuga Lake minority when it entered into the 1789 Treaty, the Cayuga majority Chiefs ended that letter in a more conciliatory tone: "It is equal to us who possess the Country, as we have sold it according to our Customs fairly and now only wish to have the Money paid that we may divide it amongst the People who are entitled to receive it; and as for the Reservation we seek no more than we made at Buffaloe Creek." *Id.* The Chiefs did, however, request Congressional intervention, reasoning that "[p]erhaps self Interest throughout your State is too prevalent to admit of impartial Decision in a Matter where they are so deeply interested." *Id.* at 342. The Chiefs closed: "We . . . , see more clearly the *Attempt on our Disunion*, and again request that neither your Surveyors nor Settlers proceed further till an Accommodation takes Place." *Id.* (emphasis added). The State postulates that the Cayuga majority's real concern was that it did not want the State to proceed with surveying under the Treaty because it might "jeopardize[] their own private land deals with the [Livingston] lessees." Tr. at 4974.

In a subsequent speech to the Cayuga, Clinton gave the State's version of how it came to be that the 1789

Treaty was between the State and the Cayuga minority, instead of between the State and the Cayuga majority. Clinton reiterated that two years prior he had "proposed kindling a Council fire at this Place, and [he] invited *my Brethern of the 5 Nations* to attend it in the Beginning of June." *Id.* at 410 (emphasis added). In fact, Clinton "intreated" all of them to attend. *See id.* When be became aware that Congress had also proposed a similar meeting with the Five Nations, Clinton postponed his and "renewed my Invitation to my *Brethern of the 5 Nations* to attend there." *Id.* (emphasis added). When he arrived, only the Onondaga were there; so he waited 14 days and then proceeded. Even with those invitations, Clinton explained that "*the Cayugas*, the only remaining Nation with whom we had Business to transact, *did not attend*." *Id.* (emphasis added). After waiting a long time for the Cayuga's arrival and their not showing up, Clinton sent them yet another "Letter of Invitation . . . to attend a Council Fire which [he] proposed to kindle at Albany in the beginning of the Winter." *Id.* In keeping with that invitation, Clinton went to Albany and after waiting "a long time," finally a "[n]umber" of Cayuga arrived. *Id.* Clinton forestalled negotiations, though, because he had "some Hopes that a greater Number of their Nation would attend[.]" *Id.* Eventually Clinton began negotiating, "finding our Embarrassments to the Westward increasing by an additional Number of People going to settle there, and despairing that any other of our Brethern of the Cayugas would meet us[.]" *Id.* Significantly, Clinton proceeded with negotiations because he had been "previously assured by the Cayugas who attended, that having taken all Circumstances into consideration *they were sufficiently authorized and would stand justified to their Nation in entering into an*

Agreement with us[.]" *Id.* (emphasis added); *see also* Tr. at 4967.

By entering into a Treaty with the Cayuga Lake minority faction in "[d]isregard[ ][of] well- known Iroquois protocols," the Cayuga contend that the State did not act in good faith. *See* Cay. Post-Tr. Memo. at 35. The U.S. takes this argument one step farther, calling New York's 1789 Treaty "duplicitous and fraudulent." *See* U.S. Post-Tr. Memo. at 22 (emphasis added). Furthermore, the U.S. accuses the State of engaging in a "divide-and-rule effort[] to break the Cayuga Nation[.]" Gov. exh 362 at 32. As further evidence of the State's lack of good faith, the U.S. points to the fact that this 1789 Treaty violated the U.S.' Constitution, which the State had ratified just seven months earlier and which expressly prohibits states from entering into treaties.

Retorting that this 1789 Treaty *was* negotiated in good faith by Clinton, the State asserts that "[a]lthough the entire Cayuga leadership had been invited to the Treaty session, Fish Carrier and his followers did not show up." St. Post-Tr. Memo. at 14. Countering the U.S.' allegations that the State "pursued a deliberate divide-and-rule strategy with the two Cayuga groups[,]" U.S. Pre-Tr. Memo. at 4, the State claims that Clinton "was uninformed in 1789 as to the extent of disunion within the Cayuga Nation." St. Post-Tr. Memo. at 14 (footnote omitted).

As detailed above, prior to the 1789 Treaty negotiations, in keeping with Iroquois protocol pre-Revolutionary War, the State invited *all* of the Five Nations to attend. In fact, Clinton postponed his originally scheduled session when he learned that Congress had proposed a similar session; and upon learning of that conflict he sent a second invitation-again, to all Five

Nations. When the Cayuga did not attend, he sent another invitation, and when finally only a few arrived, he forestalled negotiations, hoping that more Cayuga would arrive. Eventually, after waiting some time, Clinton commenced negotiations with those few Cayuga because they assured him that they were authorized to treat on behalf of the Nation.

These assurances, combined with the fact that the faction which did come to negotiate was the one residing on the Cayuga Lake land which was the subject of that 1789 Treaty, and hence actually had an interest in the subject land, *see* Tr. at 4680, made it reasonable for Clinton to assume that he could proceed with negotiations with this faction. Certainly once Clinton had assurances that the Cayuga Lake faction was authorized to enter into a Treaty with the State, he did not have an affirmative obligation to ensure the veracity of that statement. This is especially so given that approximately five months earlier the State had entered into separate treaties with the Onondaga and the Oneida. The willingness of those Nations to enter into separate treaties, apart from the Five Nations as a whole, supports an inference on Clinton's part that it was permissible to negotiate a Treaty with the Cayuga Lake faction.

In addition, even assuming that the "theoretical ideal" of 50 Chiefs agreeing to a Treaty was the practice prior to the American Revolution, given that the unity of the Iroquois confederacy was fractured by that War because various constituent Nations pledged their allegiances to Britain or the U.S., *see* Gov. exh. 363 at 438, it was reasonable for Clinton to believe the Cayuga minority's assertion that it was authorized to enter into a

Treaty with the State on behalf of the Nation as a whole.

Moreover, as the foregoing discussion demonstrates, despite the U.S.' protestations to the contrary, certainly Clinton did *not* "intentionally" deal with the "unauthorized minority" Cayuga Lake faction. *See* U.S. Post-Tr. Memo. at 22. He dealt with the Cayuga minority based upon their representations to him that they had the authority to treat with the State. Nor did Clinton, as the U.S. alleges, "*knowing[ly]* violat[e] Iroquois protocols[.]" *See id.* (emphasis added). In fact, it appears that he attempted to conform to those protocols by initially inviting all Five Nations, and when they had a conflict, he rescheduled and sent a second invitation, again, to all Five Nations.

Furthermore, although the U.S. asserts otherwise, the record is devoid of any proof of fraud on the part of the State in connection with this 1789 Treaty. The U.S.' argument that the State acted in bad faith because supposedly it pursued a divide and conquer strategy is equally weak. In the court's opinion, this is nothing more than speculation with the advantage of hindsight. There is little if any concrete evidence in the record to support this theory. Moreover, the following year this Treaty was ratified by *both* factions of the Cayuga Nation. This subsequent ratification seriously undermines the U.S.' divide and conquer theory, as does the fact that Clinton attempted to secure attendance of both Cayuga factions, even waiting a number of days for more to arrive. The court also observes that regardless of the scope of Clinton's knowledge regarding the extent of the Cayuga's disunion, the State should not be held accountable for this internal dissension among the Cayuga Nation.

On the other hand, the Cayuga's contention that New York did not act in good faith in connection with the 1789 Treaty is supported by the State's disregard for the U.S. Constitution. Surely the State did not act innocently when it proceeded to negotiate a Treaty with the Cayuga after it had ratified the U.S. Constitution which prohibited such conduct.

The following year, in 1790, both the Cayuga majority and the Cayuga minority still were discontent with the 1789 Treaty, but for different reasons. The Cayuga majority continued to be displeased because it had not been part of the negotiations, and it did not like the Treaty's terms. Aware of the Cayuga majority's complaints, in April 1790, Governor Clinton wrote a letter directly to "the Sachems, Chiefs and Warriors of the . . . Cayugas *who were not present at the Treat[y] held with that Nation[] . . . at Albany in the Year 1789*[,] inviting them to a Council Fire at Fort Stanwix where he would explain what transpired at Albany in 1789." *See* St. exh. 35 at 369 (emphasis added) and 370.

In the meantime, the Cayuga minority continued to express concern about settlers encroaching on the Reserve in contravention of the 1789 Treaty. *See* St. exh. 35 at 373. Steel Trap requested the State's assistance in removing the settlers and in preventing such encroachment in the future. *See id.* The Governor "assured [the Cayuga] that effectual Measures [w]ould be taken to remove the Intruders . . . and to prevent . . . like Abuses in [the] future." *Id.* at 374.

When Fish Carrier and the Cayuga majority arrived at the Council Fire in June, 1790, he and Clinton engaged in a series of speeches and negotiations which culminated in the majority ratifying the 1789 Treaty. *See* St. exh. 35 at 403-29. Portions of those speeches are

particularly noteworthy. In response to Fish Carrier's complaint that their "ancient Customs" were not "strictly regarded" because the Onondaga transacted business with the State before the Cayuga arrived, the Governor apologetically stated:

> I do not pretend to be perfectly acquainted with all your ancient Customs. It is but a short time since I was first called upon to transact Business with my Brethern of the 5 Nations. This much however I can say; that *I have never intentionally*, on my part, *deviated from your ancient Usages*. . . . Perhaps the peculiar Situation of our Brethren might have induced them to dispense, in some Degree, with the Observance of their former Customs; but this is not to be imputed to me, for it always has been my Desire strictly to adhere to them.

Id. at 404 (emphasis added). Seemingly appeased, Fish Carrier replied: "The Reasons you have assigned for any Departure which may have been made from ancient Usages, are satisfactory to us, and remove from our Breasts some Difficulties which had lodged there." *Id.*

Thereafter negotiations proceeded, with Fish Carrier and the Cayuga majority seeking $4,000.00 for the entire tract of land, including the reserved lands, which had been ceded a year prior in the 1789 Treaty. *See* Tr. at 2932; Tr. at 4693; and St. exh. 35 at 420. That proposal was motivated in large part by the fact that at that point the majority did not view any of the land as theirs because of the encroachment of white settlers, including Sullivan-Clinton Campaign veterans. *See* Tr. at 3323-25. Of further concern to the Cayuga majority was the fact that those white settlers would bring with them "overpower[ing] . . . strong waters[,] or alco-

hol." *See id.* at 3320. Basically, the Cayuga majority "had no interest in the Reservation, and . . . they requested that a large part of it be given to one of the private lessees, and Fish Carrier[.]" Tr. at 4694; *see also* St. exh. 35 at 420.

To Clinton this position seemed contrary to the intentions of the Cayuga minority expressed to him one year earlier. Clinton then admonished the Cayuga majority for its "unlawful Sales," the Livingston Leases by which the majority "had parted with the Places of your Nativity & even with the Bones of your Ancestors; reserving a few Acres only of your country for the convenience of Fishing." *See* St. exh. 35 at 422. Clinton continued: "We have no Right, nor are we disposed to interfere, if some of you choose to reside in one Place and others in another; but while any of you wish to continue at your ancient Place of Residence, we cannot consistent with Justice dispose of any of the Lands comprized in the Reservation." *Id.*

Following several days of negotiations at the Council Fire, on June 22, 1790, the Buffalo Creek majority ratified the 1789 Treaty which Steel Trap and the Cayuga Lake minority had entered into with the State. *See* Tr. at 5372; and St. exh. 35 at 428-29. That ratification did not change any of the terms of the 1789 Treaty, including the provision which provided that the Reservation was not to be alienated in any way; the ratification did however provide for an additional "benevolence" of $1,000.00. *See id.*; Tr. at 4696; and St. exh. 35 at 429. Given that the State now had both the Cayuga majority *and* minority agreeing to the 1789 Treaty, seemingly this ratification "significantly strengthened th[at] treaty," because the 1789 Treaty "intended to protect

the minority faction is then fully sanctioned by the Cayuga Nation[.]" *See* Tr. at 4695-96.

H. Nonintercourse Act

Exactly one month after ratification of the 1789 treaty, on July 22, 1790, Congress adopted the first in a series of acts "to Regulate Trade and Intercourse with the Indian Tribes." *See* Gov. exh. 363 at 460. The first such statute specifically provided, among other things:

> That no sale of lands made by any Indians, or any nation or tribe of Indians within the [U.S.], shall be valid to any person or persons or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty held under the authority of the [U.S.].

Id. (quoting U.S. Stat., I, 137-38). In a "reply of the President of the [U.S.] [George Washington] to the speech of . . . , Chiefs and Councillors of the Seneca nation of Indians[,]" he explained the history and purpose of this first Nonintercourse Act:

> I am not uninformed, that the Six Nations have been led into some difficulties, with respect to the sale of their lands, since the peace. But I must inform you that these evils arose before the present Government of the [U.S.] was established, when the separate States, and individuals under their authority, undertook to treat with the Indian tribes respecting the sale of their lands. But the case is now entirely altered; the General Government, only, has the power to treat with the Indian nations, and any treaty formed, and held without its authority, will not be binding.
>
> Here, then, is the security for the remainder of your lands. No State, nor person, can purchase

> your lands, unless at some public treaty, held under the authority of the [U.S.]. The General Government will never consent to your being defrauded, but it will protect you in all your just rights.
>
> Hear well, and let it be heard by every person in your nation, that the President of the [U.S.] declares, that the General Government considers itself bound to protect you in all the lands secured to you by the treaty of Fort Stanwix, the 22d of October, 1784, excepting such parts as you may since have fairly sold, to persons properly authorized to purchase of you.

Nat. exh. 44 and St. exh. 741 at 142; *see also* Tr. at 3929-30.

I. Richardson Lease

Despite the 1790 ratification of the 1789 Treaty, including the provision for the payment of an annuity to the Cayuga, by 1791, the Cayuga majority had not received any such payments, thus contributing to their poor financial situation. *See* Tr. at 2938; *see also* Gov. exh. 362 at 39; and 39 n. 13. Approximately thirteen months after ratifying the 1789 Treaty, which expressly stated that "[t]he Cayugas shall of the ceded lands hold to themselves and to their posterity forever, for their own use and cultivation but *not to be* sold, *leased* or in any other manner aliened or disposed of to others," St. exh. 728 at 216 (emphasis added), the Buffalo Creek majority sought to lease the land reserved under the 1789 Treaty (64,000 acres), "less 1 mile square, which was to be reserved for the Cayuga Lake faction." Tr. at 4697. The majority sought to lease that land to John Richardson for 20 years, and in return they were to receive a $500.00 annuity payment in cash and cattle. *See*

id.; Tr. at 5203; and Gov. exh. 404 at 4. Richardson, although not one of the named Livingston lessees, was one of a number of settlers who lived on the Cayuga Reservation "as a result of an agreement with th[os]e . . . lessees." (7/17/00) at 2924 and 2941.

Fish Carrier and Richardson approached U.S. Commissioner Pickering about this lease proposal in July, 1791, while Pickering was reaffirming a peace treaty with the Six Nations on behalf of the U.S. *See* Tr. at 2938-39. Originally Pickering "had determined to give no countenance to a lease of the Cayuga reservation," because, as he told Richardson, it could potentially violate the State's preemption right. *See* Gov. exh. 203 at 170; and Tr. at 2943. Undaunted, a few days later "the Cayuga chiefs and Richardson" again approached Pickering regarding this lease. *See id.* This time Richardson informed Pickering that as a result of the Livingston Lease, the State had passed a law which allowed for leases, so long as they did not exceed a 21 year term. *See id.*, Gov. exh. 203. Pickering asked for and received a copy of this State statute but it did not contain such a lease provision. *See id.*; and Tr. at 2944.

Nonetheless, Pickering was further informed "that at the treaty last year [1790], at Fort Stanwix, Governor Clinton *expressly assured []* "the *Cayugas* that, if they pleased, they might lease their lands." *Id.* (emphasis added), *see also* Tr. at 2943. Moreover, Pickering was also advised that a 15 year lease with the Cayuga had been allowed without State Legislative sanction because the term was less than 21 years. *See id.* Even though, in Pickering's words, "a]ll this information was repeated to [him] in such a manner as to afford a strong presumption of its truth[,]" he consulted with a New

York State county court judge who "generally confirmed" this information. *Id.*

Once again the Cayuga majority and the Cayuga minority had different objectives. After the Buffalo Creek majority agreed to the Richardson lease, the minority led by Steel Trap "sought to have [it] declared void[.]" Gov. exh. 362 at 40 (citation omitted); *see also* Tr. at 2945. Prior to that, perhaps anticipating the minority's disapproval of the Richardson Lease, "[c]oncerned that the lease would be voided, Fish Carrier [on behalf of the Cayuga majority,] asked Richardson to write to . . . Pickering and Clinton to protect it[.]" *Id.* (citation omitted). Thereafter, Pickering ratified the lease on behalf of the U.S. *Id.*

Less than a month after ratification of the Richardson Lease, in a letter to Governor Clinton, then Secretary of War Knox explained that Commissioner Pickering had "incautiously, at the earnest request of the Cayugas present, . . . ratif[ied] . . . certain lease of lands, belonging to the Cayuga Nation of Indians, to John Richardson[.]" *See* Nat. exh. 9 at 1. In that letter, Secretary Knox unequivocally stated that New York's preemption right to the "Cayuga lands[,]" was "*unquestioned*, and . . . that . . . said right embraces *all* possible alienations of said lands by the Indians, with the concurrence of the United States, according to the constitution and laws." *Id.* (emphasis added). Consequently, as "command[ed] [by] the President of the United States," Knox "explicit[ly] disavow[ed]" Pickering's ratification of the Richardson Lease. *See id.* at 1-2. Knox also advised the Governor that Pickering's acts were "*unauthorized* by his instructions, and will be considered as *entirely null and void* by the [U.S.]." *Id.* at 2 (emphasis added). In conclusion, Knox added that

if the State thought that it might "derive any benefit" from execution of the Richardson Lease, "the [U.S.] [w]ould do every thing [sic] which may be proper, upon the occasion." *Id.*

Evidently the State did not believe that it would "derive any benefit" from the Richardson Lease because, as with the Livingston Lease, it quashed the former. Dr. Whiteley offered three explanations for Clinton's motivation in quashing the Richardson Lease. First, Whiteley opined that Clinton thought that that Lease violated the State's preemption right. *See* Tr. at 2944-45. "[T]he principal reason" for quashing the Richardson lease, however, was that Clinton disfavored it because it was signed by Pickering, a federal agent; whereas there were other leases extant which had "not received federal approval[,] [but] which the state ha[d] been willing to either ignore or go along with." *Id.* at 2945. Then, based upon a September 20, 1791, letter from a State County Court Judge to Pickering, Whiteley surmises that Governor Clinton disapproved of the Richardson Lease because Clinton is "seeking to in some way speculate in the lands of the Cayuga Reservation and [he] doesn't want to have a lease of this nature to be approved by the federal agent." *Id.* at 2949.

In an effort to expel Richardson from the Cayuga Reserve, in October, 1791, Governor Clinton issued orders to the Sheriff of Herkimer County, who "proceeded with a posse of 84 men and burned out 19 families of [white] settlers, but apparently left other houses standing." Tr. at 2950. Richardson was arrested, but even in the face of that adversity he remained on the Cayuga Reservation. *See id.*

The Cayuga and the State have differing views as to the significance of the Richardson Lease. As with the Livingston Lease, the Cayuga contend that the Richardson Lease is further evidence of their "intent to *lease*, as opposed to sell their lands[.]" Cay. Post-Tr. Memo. at 42 (emphasis added). Further, according to the Cayuga, this Richardson lease evinces the State's "insistence on dispossessing the Cayugas and ridding the State of their presence." *See id.* The State is taking the opposite view: the Richardson Lease is yet another example of the Cayuga's intent to dispose of their Reservation lands. *See* St. Ph.II Memo. at 7. Rather than entering into this fray, the U.S. maintains that the State's quashing of the Richardson Lease is indicative of the State's bad faith because supposedly by quashing the Lease the State is demonstrating its own interest in speculating on the Cayuga Reservation lands. *See* Gov. exh. 362.

Inferring bad faith on the part of the State based on its conduct solely with respect to the Richardson Lease would require improper speculation by the court. The U.S.' assertion that the State was motivated by its own land speculation desires is not borne out by the record. Moreover, given the State's undisputed preemption right, combined with Knox's letter to Governor Clinton apologizing for the U.S.' improper ratification of the Richardson Lease, and the State's earlier efforts to insure a Reservation for the Cayuga Lake faction, at this point the court cannot find bad faith on the part of the State with respect to this particular lease.

J. 1793 State Statute

On March 11, 1793, the State passed "AN ACT relative to the lands appropriated by this State to the use of the Oneida Onondaga and Cayuga Indians." *See* Gov.

exh. 498 at 880 (footnote omitted). By the terms of that statute, Israel Chapin, John Cantine and Simeon De Witt were appointed agents of the State for the purpose of:

> coven[ing] the Indians of the Oneida, Onondaga and *Cayuga* nations, severally, and at their usual place of residence, and being so convened *to propose* to the said nations severally, that they should *quit claim to the people of the State, so much of the rights reserved to them* in the lands appropriated to their use by this State, *as they may think proper to dispose of,* and that for every square mile of the lands, to which the rights so by them to be quit claimed, the people of *the State shall pay the said Indians an annuity not exceeding the sum of five dollars in perpetuity,* the first payment whereof shall be made on the execution of such quit claim by the said Indians.

Id. at 880-81 (emphasis added). Chapin was named as one of the State's Commissioners because evidently he had given Governor Clinton a request from the Cayuga to dispose of their land. *See* Tr. at 5037; *see also* St. exh. 19 at 862; and Gov. exh. 202 at 862.[19]

Perhaps not coincidentally given the ongoing battle between the federal and state governments regarding control of Indian affairs, this State statute was passed

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[19] State exhibit 19 and Government exhibit 202 are both entitled "American and British Claims Arbitration Cayuga Indians[ ], Appendix to the Answer of the U.S.[,] Vol. II, Parts III, IV and V." The court received those two exhibits subject to a later determination of their relevancy. Obviously the court has deemed them relevant to the issues discussed above. Hereinafter cites will only be to State's exhibit 19, however.

only ten days after Congress had passed a second Nonintercourse Act "strengthen[ing] the requirement that Congress negotiate treaties for land cessions with Indians." *See* Tr. at 2954. Despite this second, stronger Nonintercourse Act, and despite the fact that the first such Act was authorized in July, 1790, more than two and a half years *before* the passage of the 1793 State statute, that statute does not give even passing mention to any federal participation in these proposed land cessions-a requirement of both the original Nonintercourse Act, and the second, more stringent version. As Graymont remarked, "It is clear from the terms of this [1793] act that New York State intended to maintain complete control over Indian affairs and transfers of Indian real property within its borders, *without* recourse to the federal government." Gov. exh. 363 (Graymont 1976) at 461 (emphasis added). Concurring, the State's historian testified that the 1793 State statute was "probably intended" to protect New York's interests. *See* Tr. at 5033.

Pursuant to this statute, in the fall of 1793 Governor Clinton invited representatives of all Six Nations to meet with the Commissioners in Albany. *See* Tr. at 5035; and 5042. The Cayuga majority at Buffalo Creek responded that they could not meet until the following year. However, in January, 1794, the Cayuga Lake minority, but not the Buffalo Creek majority, journeyed to Albany intent on negotiating with the State regarding a proposed land sale. *See* Tr. at 2960-61; and Tr. at 5034. Dr. von Gernet, the State's historian, testified that originally the Cayuga Lake faction had "wanted a large reserve because they thought the Cayuga Nation would come back to settle there[.]" Tr. at 5034. By January 1794, however, von Gernet opined that the Cayuga

Lake faction realized that the entire Cayuga Nation would not be reunited there. Realizing then that they had more land than they needed, the Cayuga Lake faction "decided to dispose of the entire western half of the reservation." *Id.* That faction wanted to retain the eastern half of the Reservation though because it was still residing thereon. *See* Tr. at 2960. Despite the seeming interest of both Cayuga factions in disposing of at least part of their Reservation lands, no land cession ever came to fruition between the Cayuga and the State under the 1793 statute. *See* Tr. at 3446. The State did, however, obtain "two large tracts of land" from the Onondaga under that statute. *See* Gov. exh. 363 at 461-62; *see also* Tr. at 5033-34.

Once again the Cayuga's bad faith argument revolves around the State's intent-this time with respect to the enactment of the 1793 statute. That legislation, according to the Cayuga, is further evidence of the State's repeated attempts to improperly purchase Cayuga lands, especially given the State's pledge in the 1789 Treaty that the lands reserved to the Cayuga therein "shall" be held "by them[] and to their posterity forever, for their own use and cultivation but *not to be sold, leased or in any other manner aliened or disposed of* to others[.]" *See* Gov. exh. 728 at 261, ¶ 2 (emphasis added). Given that pledge, the Cayuga argue that Governor Clinton acted "disingenuously," *see* Cay. Post-Tr. Memo. at 42; and U.S. Post-Tr. Memo. at 24, when purportedly he advised the Cayuga Lake faction that selling part of the Reservation in accordance with the 1793 statute would strengthen the 1789 Treaty terms. *See* Tr. at 2962.

The State, on the other hand, contends that the 1793 statute was motivated by the Cayuga's desire to sell

their land. Thus, rather than indicating "an intent[] to purchase" on the part of the State, this statute was an "enabling act[,]", which von Gernet defined as a "mechanism" or "legal framework" whereby the Indian Nations named therein could alienate their lands to the State if they decided to do so. *See id.* at 5030; 5031; and 5041. von Gernet further described the 1793 statute as "reactionary" in that it was enacted in response to the Livingston and Richardson Leases. *Id.* at 5023. Additionally, from von Gernet's perspective, the State preferred to purchase land in the manner set forth in the 1793 statute, as opposed to the illegal private lease arrangements, to avoid "chaotic land tenure[.]" *See id.* at 5031. In short, the State maintains that this 1793 statute did nothing more than give certain Indian Nations, such as the Cayuga, the prerogative to transfer all or part of their lands to the State.

The record is ambiguous as to the *precise* reason for the State's enactment of the 1793 statute. A series of 1794 speeches between Governor Clinton and the Cayuga recounts some of the history of the transactions between the State and the Cayuga since the end of the American Revolution. *See generally* St. exh. 19 at 860-66. Insofar as the 1793 statute is concerned, those speeches indicate that after learning that the Richardson Lease had been voided the State was "soon . . . informed" of the Cayuga's dissatisfaction "because [they] wished to sell or lease [their] lands." *See id.* at 862; and Tr. at 5039 and 5040. As Clinton explained to the Cayuga, in 1793 General Chapin "mentioned" to the Governor the Cayuga's interest in selling or leasing their lands. *See id.* Clinton then communicated that interest to the State legislature "[u]pon which the[] [Legislature] appointed three Commission-

ers, one of whom was Genl. Chapin, to confer with [the Cayuga] on this subject in order that [the Cayuga's] minds might be made easy." *Id.*; and Tr. at 5039-40. From these remarks it can be inferred, as Dr. von Gernet testified, that the State enacted the 1793 statute as a "direct consequence" of the Cayuga's previously expressed desire to sell their land to the State. *See id.* at 5038.

The record contains minimal proof to the contrary in the form of a speech by Clear Sky, an Onondaga who was traveling with the Cayuga contingent to Albany in March, 1794. *See* Tr. at 5053. In a speech to General Israel Chapin, Sr., the federal Indian agent for the Iroquois, *see* von Gernet Report at 40 (footnote omitted), Clear Sky declared that "we never have been to the Govenor [sic] and offered our lands to him[] and hope he will not endeavor to presuade [sic] us to sell our Lands at Albany." Gov. exh. 280 at 33-34; St. exh. 59 at 33-34. Of course, it may well be that the Cayuga and Onondaga themselves had not met with the Governor regarding the sale of their lands, but as set forth above their intent was communicated to the Governor via Chapin. Regardless of whether or not the Cayuga actually met with the Governor in an effort to sell their land to the State prior to the enactment of the 1793 statute, the record establishes that the State had the impression that the Cayuga were interested in disposing of their lands. Thus, the State's impression, whether unfounded or not, while perhaps not the sole reason for the enactment of the 1793 statute, was at least partial motivation for its enactment.

Moreover, regardless of the motivation for enacting the 1793 statute, the fact remains that that statute clearly gave the Cayuga the prerogative, among others,

to dispose of whatever amount of appropriated lands they "think proper[.]" *See* Gov. exh. 498 at 881. That statute did *not* put the Cayuga under any obligation to dispose of all or, for that matter, any of their land. Nor, despite the U.S.' assertion to the contrary, were the Commissioners named therein directed "to *purchase* the Cayuga Reservation[.]" *See* U.S. Post-Tr. Memo. at 24 (citation omitted) (emphasis added). Rather, the plain language of the statute indicates that the three appointed Commissioners were to "*propose* " not just to the Cayuga, but also to the Oneida and the Onondaga, that those Nations "should quit claim to the people of the State, so much of the rights reserved to them in the lands appropriated to their use by this State, *as they may think proper to dispose of*[.]" *See* Gov. exh. 498 at 881 (emphasis added). This broad language significantly weakens the U.S.' argument that the 1793 State statute proposed that the State purchase outright the Cayuga Reservation. *See* U.S. Post-Tr. Memo. at 24. Furthermore, because this statute gives much discretion, not just to the Cayuga but also to the Oneida and Onondaga, in terms of disposing of their property, taken alone it hardly establishes that the State was impermissibly trying to purchase the Cayuga Reservation in 1793.

1. Aftermath of the 1793 Statute

Following passage of the 1793 State statute, during February and March 1794 in particular, the two Cayuga factions had several meetings with Governor Clinton regarding the possibility of transferring certain of their lands, but they were never able to come to any resolution. The record contains a fair number of speeches by the Governor and different Cayuga members during that time frame. *See generally* St. exh. 19. It is not

necessary to set forth each of those speeches in great detail. The following excerpts are sufficient to show the general tenor of those meetings and to provide a backdrop for the Federal Government's Treaty with the Cayuga, and the other Nations of the Iroquois confederacy in late 1794.

In early 1794, the Cayuga Lake faction proposed to Clinton selling the western part of the Reservation to the State. *See* Tr. at 5034; *see also* St. exh. 19 at 848. Clinton reminded them, however, that he had previously "informed [them] that [their] agreement [with the State] was firm and binding [and] that the dish [*i.e.* the land] reserved for [them] was [their] own." St. exh. 19 at 849. Further, the Governor noted that "the agreement was so firm and strong that no one man however great his power could break or alter it-that the Voice of your Nation and the Great Council of our white People [*i.e.* the State Legislature] could only do it[.]" *Id.; see also* Tr. at 4704; and St. exh. 623 at 37. Despite his misgivings about the Cayuga Lake faction's request, Clinton assured them that he would communicate the same to the State Legislature, *see* St. exh. 19 at 849-50; and St. exh. 623 at 38, but that it needed time to deliberate because of the potentially harsh consequences of that request. *See id.* at 849-52; and St. exh. 623 at 39.

In March 1794, some Onondaga and some Buffalo Creek Cayuga traveled to Albany to meet with Governor Clinton regarding their land. *See* St. exh 623 at 40. Along the way they stopped at Canandaigua to consult with General Chapin, Sr. *See* Gov. exh. 59 at 32. In a speech by Clear Sky, he boldly informed Chapin that the Cayuga and the Onondaga considered Clinton to be "one who wishes to defraud us of our Lands." Gov. exh. 280 at 33. Clear Sky went on: "As we mean this meet-

ing to be the last respecting the lands-Former purchases made by the Govenor [sic] has much disturbed our minds, as he has traded with (Boys & ____) in future we mean to have the Govenor [sic] cum [sic] forward into our Country and make his Bargain Bargains at Buffaloe [sic] Creek. The Reason why we go to Albany is not because we expect to obtain presents & ____. Former bargains have made much difficulty, and has broke the Nations apart, we wish therefore that the Govenor [sic] will cum [sic] forward and make such Bargains as will give content to the whole[.]"[20] *Id.* Clear Sky was an Onondaga, but at this point, he is speaking on behalf of the Cayuga as well.

Clinton responded that he had been attempting to "reconcile" the two Cayuga factions "and do equal Justice to both parties[.]" St. exh. 19 at 864. Moreover, the Governor explained that the State "*never* desired to buy [the Cayuga's] reserved Lands[.]" *Id.* at 865 (emphasis added). The Governor further explained the State's view that it had a "duty to Protect [the Cayuga] in the enjoyment of the[ir] [lands] according to the covenant between [the State and the Cayuga.]" *Id.* Clinton proclaimed that the State had "always been ready" to protect the Cayuga in that way, but through the Cayuga's "friend" General Chapin, he had become aware that the Cayuga were "discontent[] [and] . . . wanted to sell or Lease [their] Lands[.]" *Id.* According to Clinton, Chapin had repeatedly informed him that the Cayuga and Onondaga wanted to know the Governor's "[i]ntentions" regarding their lands. St. exh. 19 at 867. In fact, by September 27, 1794, Chapin, on behalf of the Cayuga and Onondaga, had written to the Gov-

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[20] The omissions in this quote result from an inability to accurately translate the original handwritten version of this document.

ernor no less than three times because those nations "appear[ed] anxious respecting their Lands[.]" *Id.* at 866-67. Thus, despite the fact that there was a mechanism in place-the 1793 statute-which would have allowed the Cayuga, if they so desired, to dispose of all or part of their land to the State of New York, and despite the fact that the Cayuga appeared interested in doing so, during the years 1793 and 1794 no land transfers took place between the Cayuga and the State.

K. 1794 Federal Treaty of Canandaigua

What the State government was unable to accomplish in the early part of 1794, the Federal Government was. On November 11, 1794, at Canandaigua, the U.S. entered into a "peace Treaty" with the Six Nations. *See* Tr. at 2968-69; *see also* Gov. exh. 203 at 349, Art. 2. Colonel Timothy Pickering, the Secretary of War, *see* Gov. exh. 363 at 462, was the U.S.' "sole agent" for negotiating that Treaty. *See* Gov. exh. 203 at 349. In that 1794 Treaty "the [U.S.] agreed to ratify the [State's] Treaty of Albany of 1789 recognizing the existence of the Cayuga Reservation [*i.e.* the 64,000 acres]", as well as to ratify the State's 1790 Treaty with the Cayuga, thereby maintaining the *status quo* with respect to those prior two Treaties. *See* Tr. at 2968; and 3456-57. Maintenance of the *status quo* is also evident in the next provision of Article two of the 1794 Treaty wherein the U.S. explicitly declares that it will "never claim [the lands], nor disturb the[] [lands], or either of the Six Nations, nor their Indian friends, residing thereon, and united with them, in the free use and enjoyment thereof[.]" Gov. exh. 203 at 349, Art. 2.

In consideration "of the peace and friendship . . . established" under this 1794 Treaty, the U.S. delivered to the Six Nations goods valuing $10,000.00. Gov. exh.

203 at 349, Art. 6. The U.S. further agreed to the payment of an annuity totaling $4,500.00. *See id.* "[F]ifty-nine sachems and war chiefs of the Six Nations[]" signed the 1794 Treaty, *id.*, including Sachems or Chiefs from each of the two Cayuga factions. *See* Tr. at 5374; and Gov. exh. 218 at 703. Approximately two months later, in January 1795, the U.S. Senate ratified the 1794 Treaty of Canandaigua. *See* Gov. exh. 218 at 706.

Obviously the 1794 Treaty was preceded by negotiations between the U.S. and the Six Nations. For their part, during these negotiations the Cayuga once again stated a willingness to dispose of their land. In particular, several days prior to the signing of the 1794 Federal Treaty, in a speech to Colonel Pickering (who was negotiating on the U.S.' behalf), Fish Carrier, the Cayuga majority spokesperson, expounded upon the Cayuga's intent:

> The reason why we say there is something heavy on our minds is the situation of our Land. We have a little piece, and we would wish to do with it as we ourselves please: It is but a little piece, and we reap no benefit from it, not even to the value of a penny. *We want to dispose of it*, so that our women and children may reap some benefit from it.
>
> *We now desire the privilege of disposing of that land as we see fit:* and we desire that privilege to be granted to us by the State of New York.
>
> The York people not coming forward to bargain for our land according to our request altho' they have got all our country for a small trifle; *and we having but a little piece left would wish to dispose of it as we see fit.*

> Now I have laid our mind before you, we desire by all means that our request may be complied with by the York people.
>
> I mentioned having your [Pickering's] assistance and General Washinton's [sic]: and we now want you to sign this paper, to show that it was here agreed on, and that we may then send it to the York People.

St. exh. 72 (emphasis added). Fish Carrier continued, noting that even given several Cayuga inquiries to Chapin, a "great majority of [the Cayuga] nation" had not received any of the $500 annuity as the State had promised in 1789. *See id.* Therefore, Fish Carrier requested, as he had before, that the State yearly pay the $500.00 to Chapin, a federal official, and he in turn "would see it was divided right[]" among all members of the Cayuga Nation. *Id.*

On November 16, 1974, just five days *after* signing the 1794 Treaty of Canandaigua, the Cayuga Chiefs, along with the Onondaga Chiefs, "finally agreed on the following expression of their minds to Col[onel] Pickering." St. exh. 73 at 104. In yet another speech to Pickering, the Cayuga and the Onondaga again clearly expressed a "desire to dispose of [their] land[,]" but this time they specified the "for an *annual rent*, to be paid to [them] and [their] posterity *forever*." St. exh. 73 at 104 (emphasis added); *see also* Tr. at 3464. The Chiefs offered the following justification for this request:

> For we have nothing to leave to our children but what our little pieces of land will produce; and all they will produce will be but a trifle when divided among so many families: but it will at least relieve the poor, if we can obtain the just value of our land.

> . . . When we desire to dispose of our lands in this manner, we do not mean to take the seats away from any families of our nations who now live upon our reservations: So much as shall be proper, we still desire to have reserved for their use. These reserves we will agree on among ourselves if the liberty we request is granted.

Id. at 104-05; *see also* Tr. at 3464. Then, just a few days prior to the execution of the 1794 Treaty, Fish Carrier repeated his earlier request that the State, as it had promised, pay the $500 annuity to "General Chapin who [wa]s appointed by General Washington to take care of [the Cayuga]" because he "would make a just distribution[.]" *Id.* at 104.

Finally, Fish Carrier implored Pickering to have General Washington ask the State to comply with these requests. *Id.* The next day, November 17, 1794, the "principal Chiefs . . . begged" Colonel Pickering, "importunately," not to forget their requests "respecting their lands." *Id.* at 105. In light of the foregoing, on cross- examination the U.S.' historian, Dr. Whiteley, was forced to agree that "even at the Treaty of Canandaigua which recognized federal recognition of the [1789] reservation . . . , Fish Carrier and his group were earnestly requesting Pickering to arrange for the sale or lease of that tract[ ]" to the State. *See* Tr. at 3466.

Insofar as the Cayuga are concerned, the State's actions in the years between 1793 and 1794 as recounted above are indicative of its continued efforts to purchase the Cayuga Reservation when purportedly all the Cayuga wanted to do was to lease their land, not to sell it outright. *See* Cay. Post-Tr. Memo. at 43. (citation omitted). The State takes the opposite view of these events,

asserting that because in 1794 the Cayuga petitioned the State to sell the western portion of their Reservation and even after the federal treaty, Fish Carrier sought Pickering's assistance regarding the possibility of the Cayuga selling their land to the State, the Cayuga were "willing sellers who were *not* induced by New York to enter into a Treaty for the sale of their lands." St. Pre-Tr. Memo. at 8 (emphasis added). "Rather, they actively sought to treat with responsible New York officials to sell their reservation, even as they were signing the 1794 Treaty of Canandaigua with the [U.S.]." *Id.*

In support of their argument that the Cayuga did not intend to entirely dispose of their land through a sale to the State, the Cayuga exclusively rely upon Fish Carrier's request in his November 16, 1794 speech to Pickering for "annual rent" from the State. This selective reading of that speech ignores the fact that Fish Carrier had further requested that such annual rent be paid "to [the Cayuga] and [their] posterity *forever*." *See* St. exh. 73 at 104 (emphasis added). Arguably, as the State is quick to point out "[l]ike the 999-year Livingston 'lease,' a lease that lasts 'forever' is tantamount to a sale[]"-a factor which significantly weakens the Cayuga's argument that they were interested only in leasing their land, especially when just a few days before signing the 1794 Treaty Fish Carrier had repeatedly declared that the Cayuga wanted to "dispose" of their land. *See* St. exh. 72. The State's historian, Dr. von Gernet, admitted that when Fish Carrier informed Pickering that the Cayuga "desired the privilege of disposing of th[eir] land as [they] s[aw] fit[,]" that could possibly include leasing. *see* St. exh. 72. This interpretation is in keeping with Fish Carrier's speech shortly

after the signing of the 1794 Treaty, wherein he sought annual rent "forever." *See* St. exh. 73 at 104. Thus, at least at that juncture seemingly the Cayuga still wanted to dispose of their land to the State.

L. New York State's 1795 Act and the Council of Revision

Not too long after Congress had ratified the Treaty of Canandaigua, on April 9, 1795, the New York legislature passed an act entitled: "AN ACT *for the better support of* the Oneida Onondaga and Cayuga Indians, and for other purposes therein mentioned." St. exh. 48 (emphasis added). Purportedly this Act came about because of the earlier private lease agreements between those three Nations and white settlers, and the controversy which ensued therefrom. *See id.; see also* Tr. at 2970. Given that situation, along with the fact that "said tribes . . . ha[d] intreated [sic] the legislature to make such arrangement[s] . . . as shall tend to prevent future [such] controvers[ies,]" and "to render th[ose] [lands] more productive to the tribes[,]" that Act appointed Philip Schuyler, John Cantine, John Richardson and David Brooks, "or any three of them[,]" as "agents" of the State "to make such arrangements with the Oneida, Onondaga and Cayuga tribes . . . respectively relative to the lands appropriated to their use as may tend to promote the interest of . . . said Indians, and to preserve in them that confidence in the justice of this State[.]" St. exh. 48 at 614. Pursuant to the terms of this Act, tribal lands transferred thereunder would be purchased from the Indians for four shillings, or the equivalent of fifty cents per acre, but at the same time, that Act provided that those lands were to be sold at public auction for less than sixteen shillings,

or two dollars per acre. *See id.* at 616, ¶ ¶ III and VII; and Tr. at 2972.

In 1795, "the Council of Revision was a three-person body" comprised of Governor Clinton, Supreme Court Justice Chancellor Robert Yates, and Supreme Court Justice Egbert Benson. *See* Tr. at 2973-74. The Council examined any bills proposed by the legislature and it had the power to veto the same. *See id.* at 2974. As it had the authority to do, the Council of Revision ("the Council") vetoed the 1795 Act. Echoing the views of historian Graymont, the U.S.' historian testified that the Council vetoed that Act because it believed that it would not result in a "disposition in favor of the Indians[,] but a disposition something like three-fourths in favor of the state[.]" *See id.* at 2975; *see also* Gov. exh. 363 at 465. The State's historian, von Gernet, agreed that the Council "clearly [was] opposed to [the 1795 Act]" for three reasons: (1) it "did not perceive [that Act] as being solely for the benefit of the Indians[;]" (2) it "concluded that the restrictions on the [State's] agents regarding the prices . . . was inconsistent with the assurances in the [A]ct[;]" and (3) "the Indians would only receive one quarter of the benefit of the sales under the [A]ct[.]" Tr. at 5065. As von Gernet testified, the interests of those two State political bodies were divergent, with the Council, in effect, protecting the interests of the Indians, while the State Legislature had a broader interest in protecting the State's interest as a whole. *See* Tr. at 5065 and 5067. Nonetheless, examining the bigger picture convinces the court that the State was putting its own profit motives ahead of those of the Cayuga Nation, among others.

Given that the terms of the 1795 Act were so patently disadvantageous to the Indian's best interests,

the Act's title, "for the better support" of the Indians is clearly a misnomer. The terms of the Act itself demonstrate the State's obvious profit motive-a profit which was to be had at the expense of the Indians. Thus, if the State did not exhibit bad faith in overriding the Council's veto of the 1795 Act, the State's motives were highly questionable. As Dr. Graymont put it so well, "[t]he members of the [State] [L]egislature thus proved themselves to be even more covetous of securing Indian lands at bargain rates than was Governor Clinton." *See* Gov. exh. 363 at 465 (footnote omitted); and Tr. at 2977. It appears that the State, if not through Governor Clinton, than surely through the Legislature, was more interested in its own monetary gain than it was in providing "better support" to the Cayuga and other Iroquois Nations. Bluntly put, the State cannot be said to have acted in good faith with respect to the Cayuga when it forged ahead with the 1795 Act, putting its own financial gain above all else.

M. 1795 Treaty of Cayuga Ferry

This court has previously held that the 1795 Treaty is invalid under the Nonintercourse Act in that the State entered into that Treaty without obtaining Congressional ratification as the U.S. Constitution requires. *See Cayuga IV*, 730 F. Supp. at 489. That holding is now the law of the case, and thus there is no need for this court to revisit the issue of the 1795 Treaty's validity under that Act. *See Aramony v. United Way of America*, 254 F.3d 403, 411 (2d Cir. 2001) (internal quotations marks and citations omitted). Certain aspects of the 1795 Treaty negotiations do shed light on the issue of the State's alleged bad faith though.

After the State Legislature overrode the Council's veto and passed the 1795 State Act, Governor Clinton

did not "take any actions to stop the purchase of the Cayuga Reservation[,]" *see* Tr. at 2977; and the State Commissioners appointed thereunder began the treaty making process authorized by that Act. In the 1795 Treaty of Cayuga Ferry, the Buffalo Creek majority transferred to the State the approximately 64,000 acres which had been previously reserved to the Cayuga Lake minority in the State's 1789 Treaty with that faction. *See* Gov. exh. 427 at 1. In exchange for that land, the State agreed to pay an $1,800.00 annuity, *see id.* at 1-2; and Tr. at 2995, and there is no dispute that the State has paid from that time to this.

The Cayuga allege that the State exhibited bad faith in a number of ways in connection with this 1795 Treaty, particularly with respect to the negotiations. The court will address the Cayuga's contentions *seriatim*.

1. State's Awareness of Nonintercourse Act

Five years prior to the Cayuga Ferry Treaty, in July 1790, Congress enacted the first Nonintercourse Act. The Cayuga argue that the State had prior knowledge of that Act's requirements for the purchase of Indian lands, especially as they pertain to the 1795 and 1807 treaties which are at the heart of this lawsuit. Armed with that knowledge, the State entered into those two treaties in violation of the Nonintercourse Act, which the Cayuga argue is evidence of the State's bad faith here. More so than perhaps any other issue, to resolve the issue of "what did the State know" and "when did it know it" in terms of the Nonintercourse Act, the court

is able to rely almost exclusively upon contemporaneous (or nearly so) historical documents.[21]

a. Pre-1795 Awareness

Through circumstantial evidence the U.S. is attempting to establish that the State knew of the Nonintercourse Act shortly after it was first enacted in 1790. In this regard, the U.S. observes that the first Nonintercourse Act was passed in 1790 in New York City at a time when "Clinton and the New York Indian Commissioners frequently met there[.]" *See* Gov. exh. 362 at 50 (citation omitted); *see also* Tr. at 2957. Next, the U.S. observes that also at that time U.S. Secretary of State Thomas Jefferson "regularly wrote to Governor Clinton . . . enclosing 'sundry Acts of Congress' . . . ." *Id.*; *see also* Tr. at 2957. Despite that general proof, the U.S.' historian Dr. Whiteley readily admitted that he

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[21] During Phase II the court mentioned that it had previously held "in effect . . . that the [S]tate . . . was aware of the Non-Intercourse Act and that when [it] entered into the[] [1795 and 1807] treaties," it did so "improperly." *See* Tr. at 2958. To clarify, by that comment the court did not intend to imply, as the Cayuga seem to believe, that it had previously decided the extent of the State's knowledge of the Nonintercourse Act as it relates to the bad faith issue. That issue continues to be an important aspect of the Cayuga's argument that the State acted in bad faith.

In addition to relying upon this court's comment during Phase II to show bad faith, the Cayuga rely upon Judge Port's statement in the liability trial of *Oneida Indian Nation of New York v. Oneida County*, that "[t]he bad faith consisted of the violation of the Non-Intercourse Act by the State[.]" *See* Cay. Post-Tr. Memo. at 41 (internal quotation marks and citation omitted). In making this argument the Cayuga are completely disregarding this court's holding in *Cayuga XII*, 79 F. Supp.2d [illegible]8, that a finding of a Nonintercourse Act violation does not conclusively establish bad faith. *See id.* at 87-89.

could not "find a direct record of Jefferson sending Clinton the [Nonintercourse] Act[.]" *See* Tr. at 2958. Perhaps there is no such record because "many of the records in the . . . State Archives were destroyed in a fire in 1911." *Id.* Regardless, based solely upon this scant proof the U.S. infers that in 1790 Governor Clinton "[i]ndisputably" knew of the Nonintercourse Act. *See* Gov. exh. 362 at 50. In the complete absence of any proof that in 1790 Clinton was actually made aware of the newly-enacted Nonintercourse Act, or that he was actually provided with a copy of same, the court declines to make that inferential leap.

Attempting to trace the State's knowledge of the Nonintercourse Act back to the summer of 1791, four years *prior* to the 1795 Cayuga Ferry Treaty, the Cayuga rely upon two different letters from that time. The first is a July 26, 1791, letter from Captain Abraham Hardenbergh to Governor Clinton questioning the "validity" of the Richardson Lease. *See* Gov. exh. 405. Hardenbergh informed Clinton that he had written to Pickering advising him that prior to the Nonintercourse Act, the State had entered into a Treaty (the 1789 Treaty of Albany) with the Cayuga for those same lands which were the subject of the Richardson Lease. *See id.* According to the U.S., again through its historian Dr. Whiteley, this letter is "[*d*]*irect evidence* of *Clinton's knowledge* of the [Nonintercourse] *Act, and* of its import that *Congress alone* had the *authority* to *make treaties with Indians* [.]" *See* Gov. exh. 362 at 50 (emphasis added). Further, the U.S. contends, this letter demonstrates Hardenbergh's "understanding (and *implicitly* that of Governor Clinton . . .) that the [Nonintercourse] Act was governing in New York in 1791[.]" *See id.* at 51 (emphasis added).

The Cayuga's historian, Dr. Hauptman, relies upon a different 1791 letter, which again was directed to Governor Clinton and again involved the Richardson Lease, to show the State's awareness of the requirements of the Nonintercourse Act at this time. On August 17, 1791, U.S. Secretary of War Knox advised Clinton that the State's right of preemption to the Cayuga lands was "unquestioned," and that that right "embraces all possible alienations of said lands by the Indians, with the concurrence of the [U.S.], according to the constitution and laws." *See* Nat. exh. 9 at 1. On the basis of that right, as detailed earlier herein, Knox informed Clinton that the U.S. considered the Richardson lease to be "entirely null and void[.]" *See id.* at 2.

In terms of establishing the State's awareness of the Nonintercourse Act, Drs. Whiteley and Hauptman place far too much emphasis on these two 1791 letters and are reading more into them than the text actually supports. Neither of these letters is particularly germane to the issue of the State's knowledge of the Nonintercourse Act. In the first place, both letters primarily discuss the propriety of the Richardson Lease, which involved a private individual who wanted to lease Cayuga lands. That lease did not pertain to the transfers of Cayuga lands to the State under a treaty such as the Cayuga Ferry Treaty. Second, both of these letters were addressed to Governor Clinton. However, John Jay, not Clinton, was governor when the 1795 Cayuga Ferry Treaty was signed, and the record is void of any indication that Jay received either of these two letters directed to Clinton. Furthermore, it is easy to infer from the present record that even if Clinton had a full understanding of the Nonintercourse Act and its impact on subsequent State treaties with the Indians, he would

not necessarily have passed that information along to his successor Jay given that Jay and Clinton were on opposite sides of the political spectrum then. Clinton was an ardent advocate of states rights, and Jay was a federalist. For all of these reasons, the record as presently constituted does not mandate a finding that in 1791 the State was aware of the Nonintercourse Act, at least as it relates to New York State treaties with Indians.

b. 1795 Awareness

By comparison, the record does contain a series of letters in the months up to the July 27, 1795, execution of the Cayuga Ferry Treaty which provide some insight into the State's awareness of the Nonintercourse Act.

The first series of correspondence is between federal officials. In part because of its unequivocal language, one of the most significant in this series of letters is the June 16, 1795, opinion of U.S. Attorney General William Bradford, with letter of transmittal to Secretary of War Knox. Framing the issue as "whether the State of New York has a right to purchase from the Six Nations or any of them the lands claimed by those nations and situate[d] within the acknowledged boundaries of that state, without the intervention of the [federal] government[,]" Bradford responded in the negative. *See* Gov. exh. 267 at 1.

Reciting the pertinent language of the March 1, 1793, Nonintercourse Act, Bradford reasoned that "[t]he language of this act is too express to admit of any doubt upon the question unless there be something in the circumstances of the case under consideration to take it out of the general prohibition of the law." *Id.* Recognizing, among other things, that the State had made a

Treaty with the Cayuga prior to the enactment of the "present [U.S.] Constitution [,]" Bradford further opined that the land reserved under that Treaty did nothing more "than to secure to the State . . . the right of preemption[.]" *Id.* In closing, Bradford forcefully elaborated that although New York held the preemption right, those lands were "*still* the *lands* of those *nations*, and *their claims* to them, it is conceived *cannot be extinguished but* by a *treaty* holden under the *authority of the [U.S.], and in the manner prescribed by the laws of Congress.*" *Id.* (emphasis added).

On May 22, 1795, approximately two months prior to the execution of the Cayuga Ferry Treaty, federal official Chapin wrote U.S. Secretary of War Pickering concerning the State's impending treaties with the Oneida, the Onondaga and the Cayuga. *See* Tr. at 2980; *see also* Gov. exh. 277 at 1. At that time, Indian affairs were within the province of the Department of War. The exact nature of Chapin's concern is unknown because that letter has not survived. Nor is it known if that letter of Chapin's contained any enclosures, such as a copy of the 1795 State Act under which the State was proceeding with those treaties.

Regardless of the exact nature of Chapin's concern, as the record shows, Pickering's response could not have been more emphatic or more clear. In a June 29, 1795 letter, Pickering wrote that New York's proposed treaties were "repugnant" to the Nonintercourse Act. *See* Gov. exh. 277 at 1. Not only that, Pickering advised Chapin that according to Attorney General Bradford, New York tribes such as the Cayuga were *not* exempt from the Nonintercourse Act. *See id.* And, in no uncertain terms Pickering, informed Chapin that when purchasing Indian lands, "the bargain *must be made* at a

treaty held under the *authority of the* [*U.S.*]." *Id.* (emphasis added). To reinforce this view, Pickering enclosed a copy of the Attorney General's opinion letter and indicated that a copy of same had also been provided to Clinton. *See id.* at 1-2.

Characterizing the State's proposed treaties as an "unlawful designation of the New York Commissioner[,]" Pickering then commanded Chapin "as the guardian of [the Indians'] rights[,]" to "advise them not to listen to the invitation of any [State] Commissioners *unless* they have *authority from the [U.S.]* to call a treaty." *Id.* (emphasis added). In a telling postscript Pickering added: "All difficulties on this subject I expect will cease as soon as Mr. Jay's administration commences." *Id.* at 2. Former U.S. Supreme Court Chief Justice John Jay, *see* Nat. exh. 61 at 24, was Clinton's successor and "assumed office on July 1st, 1795." *See* Tr. at 3893 and 3917. Clinton "ended his term of governor in late June of 1795." *See id.*

Pickering reiterated his position several days later in a July 3, 1795 letter to Chapin, wherein he states that "[i]n a [previous] letter I informed you that such a treaty [with the Cayuga or Onondaga] could not be held without the authority of the [U.S.]." *See* Gov. exh. 278 at 1. Pickering also told Chapin that Pickering had been advised that the 1795 State Act "appointing the Commissioners directed them to apply to the [federal] Government to appoint a treaty & a commissioner to hold it[,] but that Governor Clinton would not do it." *See id.* Pickering was convinced, however, that Jay would follow the strictures of the Nonintercourse Act. *See id.* Pickering admonished Chapin, as he had in his letter a few days earlier, "that unless a [U.S.] commissioner . . . holds the treaty[,]" neither Chapin or any

one from the Federal Government "are to give any countenance to it; but on the contrary to tell the Indians that it will be improper & unsafe." *Id.*

On July 27, 1795, the same date as the signing of the Cayuga Ferry Treaty, President Washington wrote to Pickering regarding several matters. Particularly significant is the following observation by Washington:

> If the meeting of the Commissioners, appointed to treat with . . . , Cayuga . . . Indians, took place at Albany the 15th. [of July], as was expected by the extract of Genl. Schuylers [sic] letter to the Governor of New York; any further sentiment *now* on the unconstitutionality of the measure would be recd, too late.

Gov. exh. 388 at 250-51 (emphasis in original). Dr. Whiteley testified to the clear import of this language: If the negotiations for the Cayuga Ferry Treaty, occurred when Washington anticipated, *i.e.*, July 15, 1795, it would be "[t]oo late to prevent the treaty taking place." *See* Tr. at 3477. By the same token, Washington proceeded to write that if that Treaty had "not take[n] place, . . . [i]t is my desire that you would obtain the best advice you can on the case and do what prudence, with a due regard to the Constitution and laws, shall dictate." *See* Gov. exh. 388 at 251.

Shortly after the signing of the Treaty at Cayuga Ferry, Chapin wrote Pickering outlining what had transpired there. Chapin apologetically explained that "unfortunately" only on that day, July 31, 1795, *four* days *after* the execution of this Treaty, did he receive Pickering's earlier letters of June 29th and July 3rd which emphatically stated, based upon the Nonintercourse Act, that a state could not enter into a Treaty to

purchase Indian lands without the approbation of the U.S. *See* Gov. Exh. 269 at 1. Chapin told Pickering that the four Commissioners named in the 1795 State Act "purchase[d] the Cayuga reservation" for $1,800.00 to be paid annually, reserving six square miles to the Cayuga and "their children forever." *Id.* Chapin admits being aware of the Nonintercourse Act, but because he did not have "any directions" from Pickering, Chapin "endeavored to not interfere" because he presumed that the State Commissioners "were fully authorized by the Government of the [U.S.][,]" as well as by the State, and that they had "full power to transact the business." *Id.*

Chapin further wrote that the State Commissioners had ignored his request to see the 1795 State statute. *See id.* at 1-2. At the Indians' "request[,]" Chapin went with them to the Treaty, but he asserts that he did "not use[ ][his] influence with them, as [he] very soon s[aw] [that] they were determined to manage the business as a separate interest from the [U.S.]" *Id.* at 2. According to Chapin, when he inquired of Schuyler as to how the Nonintercourse Act should be construed, Schuyler "made very little reply [,]" except to [say] that that Act was "very well where it . . . correspond[ed] with that of an individual State." *Id.* Chapin then assured Pickering that if he had received Pickering's earlier letters, he would have conducted "the business more to [Pickering's] mind[,]" but he presumed that the State "had applied to the [federal] Government and had obtained sufficient power to call the Indians to the treaty[.]" *Id.* at 2. Chapin was quick to note, however, that he had been "cautious" so that it would not appear that he was attending the 1795 Treaty on behalf of the U.S., because he had "no special directions" from the federal

government, and so he attended solely as a "private individual [.]" *Id.* at 203.

During the same time period, State officials were also corresponding about the State's treaty making under the 1795 State Act. In a letter dated June 9, 1795, one of the Commissioners appointed under the Act, Philip Schuyler, wrote to newly-elected Governor John Jay, who had not yet taken office. *See* St. exh. 738. Among other things, in that letter Schuyler advised Jay, in very basic terms, of the 1795 Act. On the basis of the authority invested in the Commissioners appointed under that Act, Schuyler goes on to explain that "[i]t was agreed to meet [the Oneida, Onondaga and Cayuga tribes]" on July 15, 1795, and they had been so notified. *Id.* at 2. The plan was that the Commissioners, except Clinton, would meet in Albany on July 1, 1795, and proceed to Onondaga where they would convene their Treaty negotiations with the Onondaga and the Cayuga. *See id.* Schuyler invited Jay to join he and the other Commissioners at this "conference[.]" *See id.*

On June 13, 1795, prior to taking office, Jay received a congratulatory letter from State Supreme Court Justice Benson (former State Attorney General and member of the Council which vetoed the 1795 State Act), wherein Benson expressed interest in being appointed as a Commissioner with respect to the State's proposed treaty with the St. Regis Mohawk Indians. *See* Gov. exh. 376; *see also* Tr. at 2966. Benson also reminded Jay of the existence of the 1793 Nonintercourse Act, candidly concluding: "There is the *Rub* with your Predecessor [sic] [Clinton], and I would not trust him to make a full and seasonable Communication of this Business to You." *See* Gov. exh. 376 at 2 (emphasis in original).

In addition to receiving correspondence from State officials regarding the State's treaty making, Jay exchanged letters with Secretary of War Pickering. On July 6, 1795, newly-elected Governor Jay received a letter dated three days earlier from Pickering, *see* Gov. exh. 238, which included a copy of Attorney General Bradford's opinion letter. *See* Gov. exh. 289 at 1. Even in the face of Bradford's unequivocal opinion letter, in a letter dated July 13, 1795, Governor Jay told Pickering that his "information relative to the Indian Affairs of [New York] [was] imperfect" and that is why Jay did not respond sooner to Pickering. *See* Gov. exh. 238 at 1. Furthermore, in that letter which Jay wrote less than two weeks after assuming office, in a circumspect fashion he stated that "on *this* occasion I think I should forbear officially to consider and decide" the issues of "[w]hether the Constitution of the [U.S.] warrants the . . . 1793 [Nonintercourse Act] and whether the [1795] act of this State . . . , is consistent with both or either of them[.]" *Id.* (emphasis in original). Jay did observe though that the 1795 State Act was "silent" regarding "any intervention or concurrence of the [U.S.] . . . and I do not observe any thing in it which by implication directs or authorizes the Governor to apply for such intervention or which implies that the Legislature conceived it to be either necessary or expedient." *Id.* at 1-2. Apparently in an effort to distance himself from the State's treaty negotiations, Jay reminded Pickering that "[t]he arrangement of this business was finished, *before* I came into office[.]" *See id.* at 2 (emphasis added).

Governor Jay wrote another letter to Pickering, on July 18, 1795, this time to alert him of the St. Regis' claims to lands in the northern part of the State, and

the State's intent to treat with those Indians in mid-September, 1795. *See* St. exh. 740 at 1 and 2. After briefly recounting the State's prior dealings with the St. Regis, Jay set forth his understanding of the procedure to be followed with respect to that planned Treaty. Jay observed the need for the U.S. to appoint at least one commissioner to treat with the Indians so that the State's negotiations with the St. Regis would "be conducted conformably to the [Nonintercourse Act.]" *See* St. exh. 740 at 2; *see also* Tr. at 3921. Jay provided this accurate, albeit simplified description of the procedure to be followed under the Nonintercourse Act despite the fact that just five days earlier he claimed an "imperfect" understanding of New York's Indian affairs. *See* Gov. exh. 238 at 1.

In March 1796, the State ratified the 1795 Cayuga Ferry Treaty, *see* Tr. at 2997; but to this day the U.S. has *never* ratified it. *See* Tr. at 3479. Approximately eight months after the State's ratification, in November 1796, the State surveyed and divided the land which it had purchased under the 1795 Treaty, and sold it at a public auction.

The Cayuga maintain that the foregoing events, as described through this correspondence, show that the State knew about the requirements of the Nonintercourse Act, but "*wilfull*[*y*] *defi*[*ed*]" the same when it "entered into the [1795] Cayuga Ferry Treaty." *See* Tr. at 3916-17 (emphasis added). Likewise, the U.S. asserts that the foregoing shows "that the State demonstrably was aware of the existence and proper interpretation of the Non-Intercourse Act[,]" but despite that knowledge it entered into the 1795 Treaty in violation of that Act. *See* U.S. Resp. at 5. (citation omitted). The State's response is two-fold: (1) it was unaware of the Noninter-

course Act until after-the-fact; and (2) in the eight months lapse between the treaty's signing and its ratification by the State legislature, "[n]othing was done by any federal official . . . to advise the State that the 1795 treaty was deemed by them to be invalid." *See* St. Post-Tr. Memo. at 36. For these reasons, the State contends that even though it violated the Nonintercourse Act with respect to the 1795 Treaty, nonetheless, it acted in good faith.

Addressing the State's opposition arguments in reverse order, the court agrees that in the interim between the execution of the 1795 Cayuga Ferry Treaty and its ratification by the State legislature eight months later, the U.S. did not take any action to notify the State that it deemed that Treaty to be invalid under the Nonintercourse Act. Even if, as the U.S. urges, it did take "affirmative steps to stop the 1795 treaty from happening[,]" *see* Tr. at 2981, that is not directly responsive to the State's argument. The State is not challenging the U.S.' conduct *prior* to the 1795 Treaty, rather it is questioning the U.S.' conduct *after* execution, but before ratification of that Treaty.

For several reasons the court finds particularly troublesome the U.S.' failure to notify the State before ratification of the 1795 Treaty that that Treaty was not carried out in accordance with the Nonintercourse Act. Correspondence outlined above from various federal officials shows that well before the State's execution of this treaty, the U.S. was aware of a possible Nonintercourse Act violation if the State did not comply therewith, *i.e.* act under the authority of the U.S. Likewise, that correspondence further shows that in 1795 the U.S. was acutely aware of the State's intent to enter into a treaty.

Furthermore, even if the State officials did not have a strong grasp on the Nonintercourse Act and its implications for state treaties, such as the 1795 Cayuga Ferry Treaty, there is ample proof showing that the federal officials had a keen understanding of that Act and states' obligations thereunder. Despite that, as the State is quick to point out, before ratification of that Treaty, the U.S. had eight months in which it could have informed the State of the necessity of conforming the same to the Nonintercourse Act. The U.S.' inaction during that interim period is all the more striking because it *did* act promptly to invalidate the Richardson Lease, declaring it "entirely null and void" less than a month after its ratification by the State. *See* Nat. exh. 9 at 1. Nothing suggests that any federal official took any such similar action here. In fact, in his July 27, 1795 letter, President Washington essentially concedes that if this Cayuga Ferry Treaty had already been executed, it should be allowed to stand. And, on that exact date the 1795 Treaty was executed.

The State's assertion that despite its failure to comply with the Nonintercourse Act, it acted in good faith because it was unaware of that Act until *after* that Treaty's execution is less convincing. Perhaps more than any other issue in this case, the court's ability to determine exactly when the State became aware of the necessity of complying with the Nonintercourse Act is hampered by the passage of time. Those with firsthand knowledge of this in some ways critical issue, the State and federal officials involved, obviously have long since passed away. And even though their correspondence is part of this record, its value is limited because much of it is open to differing interpretations.

These differing interpretations are attributable to several factors, including, naturally, the authors' use of the language of the day. It is not always easy for a modern day reader, even the three expert historians who testified during Phase II, to ascertain the precise meaning of these words which were quite literally written in a time and place far removed from the present. Adding to the difficulty in trying to figure out the extent of the State officials' knowledge of the Nonintercourse Act was their tendency to write rather obliquely. Thus, although this correspondence does shed some light on the issue of the State's awareness of the Nonintercourse Act, it is not enough.

The record does not support the U.S.' assertion that the State was "*demonstrably* aware of the existence" of the Nonintercourse Act prior to July 27, 1795-the Cayuga Ferry Treaty's execution date. *See* U.S. Resp. at 5 (emphasis added). An inference can be drawn from the record, however, of the State's awareness generally, prior to July 27, 1795, of the existence of that. Support for this inference can be found in the two letters which Jay received in June, 1795, prior to assuming office as governor. In those letters, as previously discussed, the Nonintercourse Act was at least referenced, although not specifically in terms of the relationship between that Act and the State's then pending Treaty negotiations with the Cayuga. The fact that less than a week after assuming office, Governor Jay received a copy of Bradford's opinion letter, where the State's necessity of complying with the Nonintercourse Act could not have been stated more plainly, lends further support to the inference that Jay was aware of that Act. Just one day prior to the beginning of the Cayuga Ferry Treaty negotiations, *see* Tr. at 3922, on July 18,

1795, Jay demonstrated a passable, working knowledge of the Nonintercourse Act and its impact upon the State's planned treaty with the St. Regis. *See* St. exh. 740. Jay's prior governmental experience, as set forth above, lends further credence to the view that the State, through Jay, was at least aware of the Nonintercourse Act's existence before July 27, 1795.

The inference that Clinton was aware of the existence of the Nonintercourse Act prior to the State entering into the 1795 Treaty is more tenuous. Examining the record as a whole, however, Clinton's awareness of the fact that there was a federal statute such as the Nonintercourse Act seems likely. For example, there is inferential evidence that Clinton would not comply with the Nonintercourse Act. *See* Gov. exh. 278 at 1. To decide not to follow that Act, it is safe to assume that Clinton would have had to have been aware of it in the first place. Unlike Jay, who, the record shows did receive Attorney General Bradford's forceful opinion letter, the record is silent as to whether Clinton ever received it.

Even if the State was generally aware of the existence of the Nonintercourse Act, that is far different than being "demonstrably aware;" and, more significantly, it does not necessarily follow from that general awareness, as the U.S. maintains, that the State was aware of the "proper interpretation" to be accorded that Act. *See* U.S. Resp. at 5. If anything, the record shows some confusion on the State's part in terms of the relationship between that federal Act and the State's own 1795 Act authorizing State Commissioners to treat with the Indians.

Contributing to the confusion over whether the State was aware of the "proper interpretation" of the Nonin-

tercourse Act is the fact that the 1795 Cayuga Ferry Treaty had been set in motion by Governor Clinton, a staunch advocate of states' rights who, as the record shows, resented the Federal Government's attempts to assert its power over Indian affairs within New York State. By the time that Treaty was actually signed, however, Jay, a federalist, *see* Nat. exh. 61 at 22, was New York's governor. Presumably, as a federalist, Jay would have been far more likely to defer to federal law and federal policies regarding Indian affairs, than would a supporter of states rights, such as Clinton.

In any event, the 1795 Treaty seems to have fallen between the cracks in that it was initiated by a states rights supporter, Clinton, who from the evidence, appears to have been more than willing to proceed without any involvement by the Federal Government. In the meantime, Jay, a federal rights' advocate, became governor and even though he was more likely to comply with the Nonintercourse Act and did so shortly after the Cayuga Ferry Treaty, he felt powerless to intervene in that particular Treaty, as is evidenced by his reminder to Pickering that "[t]he arrangement of this business [the Cayuga Ferry Treaty] was finished, before I came into office[.]" *See* Gov. exh. 238 at 2. Consequently, the court cannot find, that the State willfully defied the Nonintercourse Act with respect to the 1795 Treaty. Nor can the court find, as the U.S. urges, that the State was "demonstrably" aware of that Act and its "proper interpretation," and yet still proceeded with this 1795 Treaty contrary thereto. To be sure, the State did have a general awareness of the Nonintercourse Act, but the scope of that awareness, especially as to this particular Treaty is vague.

Despite several ambiguities regarding the scope and timing of the State's awareness of the Nonintercourse Act, there is no ambiguity in the fact that Pickering's letters to Chapin, wherein he explicitly instructed Chapin how to proceed with the Cayuga Ferry Treaty so that it would conform to the strictures of the Nonintercourse Act, arrived too late for Chapin to prevent execution of that Treaty. This makes it harder to lay the blame entirely at the State's feet especially when the U.S. itself did not come forward in the months immediately following the Treaty's execution and insist that it be brought into compliance with the Nonintercourse Act prior to its ratification by the State. Moreover, both President Washington and Secretary of War Pickering seemed content to let the matter rest given that, in a manner of speaking, "the damage had already been done." *See* Gov. exh. 388 at 250-51; and St. exh. 729.

2. Negotiation Process

In the 1789 Treaty between the State and the Cayuga Lake minority, the State "assured" the minority that it would keep them in "peaceable possession" of the lands which they retained under that Treaty. *See* Gov. exh. 298 at 2; *see also* Tr. at 5073. In fact, just four days prior to the signing of the 1795 Cayuga Ferry Treaty, Captain Key, the Cayuga Lake faction's spokesperson at the time, reminded the State Commissioners of that 1789 pledge. *See* Gov. exh. 298 at 1 and 2. Despite that earlier pledge to the Cayuga Lake minority, the State's 1795 Treaty was with the Buffalo Creek majority, and it was for the sale of nearly the entire claim area, including those lands which the State had previously assured the Cayuga Lake minority that

it would not sell without that faction's approval. *See* Tr. at 2995; *see also* Gov. exh. 427.

Tracing the 1795 Treaty negotiation history reveals a process which was complicated by the fact that the two Cayuga factions were frequently at odds with each other pressing differing objectives. In the days leading up to the signing of that Treaty, before the arrival of the State Commissioners, the two Cayuga factions met to attempt to reach a compromise regarding the position they were going to take with the State regarding the Cayuga lands. Because of the internal divisions, the Cayuga Nation as a whole was unable to present a united front to the State in terms of how it wanted to proceed. *See* Tr. at 4721.

The Cayuga Lake faction wanted to sell the western side of the Reservation, which had been set aside for it in the 1789 Treaty, *see* Gov. exh. 298 at 2, while at the same time it wanted to retain approximately 50 square miles of that Reservation so it could continue living there. *See* Tr. at 4721. Captain Key, on behalf of the Cayuga minority, made that proposal to the Commissioners. *See* Gov. exh. 298 at 2. The Buffalo Creek majority, however, wanted to retain only *one square mile* for the minority, *see* St. exh. 103 at 3, because it was still hopeful that the two factions would be reunited at Buffalo Creek. *See* St. exh. 106 at 6 ("We have lands at Buff[alo] Creek and we love our Bro[thers] & wish them to come & live with us."); *see also* Tr. at 4727. In fact, so interested was the Buffalo Creek faction in having the Cayuga Lake faction join it at Buffalo Creek, that as incentive for the two factions to reunite, the majority "insist[ed]" that the annuities payable under the 1795 Treaty be paid at Buffalo Creek rather than at Canandaigua. *See* St. exh. 106 at 5; *see also* Tr. at 4727.

In a July 22, 1795 speech, Hanging Face, the Buffalo Creek majority's spokesperson,[22] advised the State Commissioners of the internal division:

> We arrived here some days before you came, and we have been endeavouring [sic] to unite in sentiment with our Brethren who live on the Reservation [the Cayuga Lake faction], but they have declined giving an answer until the Commissioners should arrive.

St. exhs. 102 and 103 at 2. That speech was not the first time the State had become aware of the divergent interests of the two Cayuga factions. The Buffalo Creek majority wanted to dispose of practically the entire Reservation created by the 1789 Treaty, but the Cayuga Lake minority, who were still living on that Reservation, wanted to retain a fair sized land base there. Recognizing the possibility that the two factions would continue to reside in different areas, as they had in the previous years, in his July 19, 1795, opening speech (prior to Hanging Face's speech), General Schuyler counseled:

> *If any part of your nation* continues to reside on the land apportionated [sic] to your use and occupancy, *and another part* continues to reside at Buffalo Creek or elsewhere, you ought to stipulate what portion of the money to be annually paid you should be paid to each party, as *this will present controversy amongst yourselves* and prevent the effects of partiality in the agent, who may be entrusted with the distribution.

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[22] Hanging Face was Fish Carrier's deputy, and as the latter aged, Hanging Face became the principal spokesperson for the Buffalo Creek majority. *See* St. exh. 623 at 48.

> But, Brothers, *it would afford us much more pleasure if your whole Nation would collect and settle on such part of your reservation as you may not incline now to dispose* of.

St. exh. 80 at 2 and 5 (emphasis added). What is more, when the Buffalo Creek majority proposed reserving one square mile for the use of the minority, the State responded that that was "insufficient" because thirteen families were living there. *See* St. exh. 104 at 1-2. Therefore, the State made a counter proposal that two square miles should be reserved to the minority; and that was done. *See* St. exh. 104 at 1-2; Gov. exh. 427 at 2, ¶ 4; and Tr. at 3004.

The Cayuga urge the court to imply bad faith on the State's part because during the 1795 Treaty negotiations it disregarded the concerns of the Cayuga Lake minority by "refus[ing]" the minority's proposal to sell a portion of the Reservation, and then "proceed[ed] only to deal with the [Buffalo Creek] majority." *See* U.S. Post-Tr. Memo. at 26 (citations omitted). This argument carries little weight with the court. It is premised upon the Cayuga's belief that the State had changing allegiances in terms of which Cayuga faction it was dealing with at any given time; or, in the words of the U.S.' historian, the State had a "divide-and-rule approach[,]" intentionally playing one Cayuga faction off against the other to advance the State's own interests. *See* Gov. exh. 362 at 57. Referring to the Buffalo Creek majority as the "authorized leadership of the Cayuga Nation," the State asserts that the majority were "willing sellers." St. Post-Tr. Memo. at 28.

Admittedly, by entering into the 1795 Treaty with the Cayuga majority, the State did not strictly abide by the terms of the 1789 Treaty with the Cayuga Lake mi-

nority because it sold the lands reserved under that latter Treaty without the minority's approval. Nevertheless, the court is reluctant to find that such conduct, standing alone, demonstrates that the State acted in bad faith. The State should not be held responsible for division and internal strife within the Cayuga Nation. Indeed, given the majority's interest in disposing of as much of the Cayuga lands as possible in exchange for annual payments, without the State's intervention on the minority's behalf, doubtless that faction would have received even less than it did under the 1795 Treaty. If the Buffalo Creek majority had its way, the minority would only have had one square mile, but at the State's insistence the minority retained two square miles. Given that in 1795 the Cayuga Lake minority represented only about 12-13% of the entire Cayuga population, a reserve of two square miles does not seem unreasonable. *See* Tr. at 4942. Rather than evincing an intent by the State to "divide and conquer," as the U.S. posits, the State's conduct at the 1795 Treaty negotiations, especially when viewed in the context of the preceding history between the State and the Cayuga factions, shows the difficulty the State had in dealing with the Cayuga Nation, which was sharply divided as to what should be done with its lands.

The availability of alcohol is yet another reason the Cayuga offer to support a finding of bad faith during negotiations of the State at the 1795 Cayuga Ferry Treaty. Several references to alcohol and Indians are in the record. *See, e.g.*, Gov. exh. 324 at 175 ("[T]he Six Nations wanted traders to be licensed, in order that unscrupulous whiskey-sellers and other undesirables could be excluded from . . . Indian country[.]"); and Gov. exh. 218 at 692-93 (noting that on November 3,

1794, with respect to the Treaty of Canandaigua, "no business was done because the chiefs avoided the issue and got drunk[]"). Specific references to alcohol at the 1795 Treaty session in particular are scant, however. On direct examination, the Cayuga's historian asserted that Schuyler "brought alcohol or alcohol was used to ply the Indians at the treaty grounds." *see* Tr. at 3950-51. Hauptman was forced to admit on cross-examination though that his only source for this bald assertion did not actually support it. *See* Tr. at 4221-22.

Moreover, in a July 19, 1795 speech General Schuyler reminded the Six Nations that:

> [I]n transacting business of importance, it is necessary that both parties should act with candor and moderation. Neither should insist on terms that are improper or immoderate. *Each party shall be sober and discreet, and possessed of their reason. We shall therefore moderate ourselves in the use of spiritous liquors and as far as it depends on us, we shall prevent excess in you.* To this end, we shall not give any rum to any of your people, except what is given to be drunk around this Council fire and what may be necessary to take to your encampment.

St. exh. 80 at 5-6 (emphasis added). As this speech reveals, the State did provide alcohol at the 1795 Treaty sessions, but There is nothing in the record establishing that the alcohol in any way effected the Cayuga and their ability to carry on with treaty negotiations. The absence of such evidence, and considering the record as a whole, convinces the court that the availability of alcohol was nothing out of the ordinary for treaty making at that time, and it is certainly not indicative of bad

faith on the part of the State, especially given Schuyler's emphasis on moderation.

The Cayuga contend that the State engaged in "bribery" in connection with the 1795 Treaty, and supposedly this too demonstrates bad faith on the part of the State "by currying favor with the Cayugas, overcoming their distrust, and influencing their agreement through the payment of gratuities." *See* Cay. Reply at 21. Of the three historians who testified, only Dr. Hauptman raised this notion of bribery by the State. To support this contention Hauptman relied upon a ledger, which was not made a part of his report, "list[ing] four Cayugas who received four payments of $10." Tr. at 4140-41; *see also* Tr. at 3951; and St. exh. 742. Using Hauptman's own definition of a bribe, as "an illegal payment to an official or individual to seek some favor," *see* Tr. at 4142, the record fails to support a finding of bribery by the State. The mere fact that that ledger did not include entries listing the reasons for certain payments does not, as Hauptman urges, show that the State engaged in bribery. By attributing to the State the worst possible motive to actions, which if not wholly innocent, were in keeping with the mores of that time and place is nothing more than a far flung attempt by the Cayuga to show bad faith where none exists,. *See* Tr. at 4713 ("[I]t [is] unfortunate that a term like bribery has been used to describe what were, in essence, cultural norms of the day and were so transparent that they were blatantly recorded in ledgers and other forms.").

Based upon Hanging Face's speech to the State Commissioners on July 25, 1795, wherein the Cayuga "agree" to the State's "propos[al] to take a lease *for ever* [sic][,]" the Cayuga further assert that they were not aware that they were transferring their lands at the

1795 Treaty. St. exh. 106 at 4 (emphasis added). According to the Cayuga this alleged confusion arises in part because their concept of land ownership differs from that of "European legalities." *See* Cay. Pre-Tr. Memo. at 53. The U.S., relying in part upon Hanging Face's July 22, 1795 Speech to the Commissioners, wherein he proposed a 22 year lease, asserts that the Cayuga *did* have an "understanding of the principle of ownership[.]" *See* Gov. exh. 362 at 57. Regardless of whether the Cayuga had an understanding of the consequences of their actions in terms of principles of land ownership, this is irrelevant to the bad faith issue because there has been no showing that the State was aware of or fully understood these claimed cultural differences. Furthermore, there has been no showing that the State improperly used the knowledge of these alleged differences to its advantage.

3. Commissioners' Conflicts of Interests

As an additional basis for establishing the State's bad faith vis-a-vis the 1795 Treaty, the Cayuga allege that the four Commissioners appointed as agents of the State under the 1795 Act had conflicts of interest because they "stood to gain personally from a land treaty with the Cayuga[]." *See* Cay. Post-Tr. Memo. at 47. Looking at events retrospectively, the U.S. similarly asserts that the New York Commissioners "benefit[ted] from the 1795 transaction[,]" which is indicative of bad faith on the part of the State. *See* U.S. Post-Tr. Memo. at 26. The State challenges these assertions from a factual standpoint, as well as by arguing that whether a conflict exists should not be determined with the advantage of hindsight.

Philip Schuyler, a prominent, well-to-do New Yorker of some stature and influence was the negotiator for the

State during the Cayuga Ferry 1795 Treaty negotiations, *see* Tr. at 5163, although all four Commissioners signed that Treaty. *See* Gov. exh. 427 at 3. Prior to 1795, Schuyler had held various positions in both the Federal and State Governments, where presumably he gained some knowledge of Indian affairs, although the record is unclear as to the depth and scope of that knowledge. During the American Revolution, Schuyler had been a Federal Commissioner dealing with the Iroquois Confederacy as well as "one of the leading generals of the [U.S.]" *See id.* at 2979 and 4078. In addition, during the 1790s he had periodically served as a U.S. Senator. *See id.* at 4078. Schuyler's list of accomplishments does not end with his federal service. Prior to his appointment as State Commissioner, he had also served as a New York State Senator and Surveyor General of that State. *See id.* Finally, not surprisingly, Schuyler was "one of the largest, [if not] the largest land holders and wealthiest people in the [S]tate." *Id.*

In stark contrast to Schuyler, of the four State appointed Commissioners, John Richardson probably was the least qualified to serve in that capacity. Richardson was described as a "yeoman" in his indenture for his 1791 private lease with the Cayuga, which the State later declared illegal. *See* Tr. at 2979. The U.S.' historian testified that Richardson had "no special qualifications" to serve as a State Commissioner, and that his appointment was based upon "nothing more than the fact that he ha[d] a great deal of interest" in the Cayuga lands in that, among other things, he resided there off and on for several years preceding the 1795 Treaty. *See id.* at 2978 and 2979. The other view of Richardson's appointment is that "precisely" because he did own an interest in the Cayuga land, as a settler who had peri-

odically resided there with the Cayuga's consent, he was appointed to represent the views of other settlers such as himself, and to present preemption petitions to the Commissioners on behalf of those settlers. *See* Tr. at 5158; and 5139. Regardless of the underlying motivation for Richardson's appointment, the record shows that he and Schuyler were each fairly high profile individuals of the time, although for very different reasons. The other two State appointed Commissioners, Cantine and Brooks, were not so high profile. John Cantine had been a State surveyor and an ally of Schuyler's in 1789. *See id.* Brooks' stature most likely came from his status as a State judge. *See id.* at 2979.

In November, 1796, the State auctioned the Cayuga lands which it had acquired pursuant to the 1795 Cayuga Ferry Treaty. Article ten of the State's 1795 Act contemplated that settlers who had been residing on Cayuga land for a certain amount of time prior thereto, such as John Richardson, could claim preemption rights which normally belonged to the State. *See* St. exh. 48 at 617. Implicit in Article ten is the recognition that each settler would be allowed only one preemption lot, not to exceed 250 acres. *See id.* Of the approximately 200 available lots, roughly 20 to 30 were preemption lots. *See* Tr. at 3003; *see also* St. exh. 115. Three of the four State Commissioners appointed under the 1795 Act personally acquired land, but only one, Richardson, did so by exercising his right to preemption. The other two Commissioners who acquired land at the auction, Brooks and Cantine, did so by successfully bidding on that property, not by exercising any preemption rights. Cantine obtained ten lots and Brooks six. *See* St. exh. 115.

In ascertaining whether the four Commissioners appointed under the 1795 Act had a conflict of interest, the State maintains that any potential conflicts of interest must be examined in light of the "facts known and knowable at the time of the 1795 treaty, not on unforeseen subsequent events." *See* St. Reply at 22. Furthermore, according to the State, whether or not a conflict existed should not be judged by 20th or 21st century standards, where there has been a heightened sensitivity to such conflicts. The Cayuga remark that "the concept of a conflict of interest did not originate in modern times." Cay. Reply at 17 (citation omitted). Although the concept of a conflict of interest is not new, undoubtedly the standards which are used to determine the existence of same may well differ depending upon the time and place of the conduct being judged. The court declines to apply current and arguably stricter standards regarding potential conflicts of interest to this centuries' old conduct.

It is especially important for the court to keep in mind that the acts of which the Cayuga now complain took place over 200 years ago, in a world far different than today's. In 1795 New York State was unpopulated compared to today, making it more difficult to find qualified but completely unbiased individuals to serve the State. Therefore, it is not surprising that the four Commissioners appointed under the 1795 Act were all involved in various aspects of State life at the time, not only with the State's dealings with Indians. As Dr. von Gernet, the State's historian, so aptly put it, "[I]n those days it was far more common, given the intimacy of the people involved, to have overlapping interests." Tr. at 5160. Thus, to the extent possible the court will view

the conflicts alleged here in historical context, keeping in mind the foregoing.

Insofar as Brooks and Cantine are concerned, the only basis for the Cayuga's claimed conflict here seems to be that these two Commissioners successfully bid on several lots at the 1796 auction. Several factors significantly undermine this argument. First, as specified in the 1795 Act, the auction was public and nothing in that Act or elsewhere precluded Commissioners appointed thereunder from participating in that auction. *See* St. exh. 48 at 617. Second, to find a conflict it must be presumed that when carrying out their statutory duties, these two Commissioners subordinated the Cayuga's interests to the Commissioners' own desire to later purchase parcels of Cayuga lands for their own use. The record does not support such a presumption. Cantine and Brooks were both eligible to participate in the 1796 public auction and they did. There has been no suggestion that there was any impropriety in the bid process itself. Consequently, the court fails to see how Cantine and Brooks can be deemed to have had a conflict of interest.

Whether Schuyler or Richardson, or both, had a conflict of interest is more debatable. For example, even the State's own historian admitted on cross-examination that "Schuyler may or may not have had some conflict of interest." Tr. at 5159. The primary argument for finding that Schuyler had a conflict comes from the Cayuga's historian, Dr. Hauptman. In keeping with the theme of his research in recent years, Dr. Hauptman testified at some length that Schuyler supposedly had a conflict of interest because, in Hauptman's view, Schuyler was trying to obtain the Cayuga Reservation to further his own interests in

promoting a canal system throughout New York State. Substantially for the reasons set forth by the State at page 21 of its Reply Memorandum, this argument does not carry much weight with the court.

Particularly compelling among those State arguments is arguments that there is no basis for this particular alleged conflict because Schuyler easily could have pursued his transportation interests without obtaining any Cayuga land. In fact he did. Furthermore, absent from this record is any indication that Schuyler purchased Cayuga lands at the 1796 auction. *See* Tr. at 5432; *see also* St. exh. 115. Given Schuyler's stature in the community at the time, in combination with his extensive Federal and State service, including prior involvement with the Iroquois Confederacy, his appointment as Commissioner under the 1795 Act was not out of the ordinary and not necessarily indicative of bad faith on the State's part. In fact, had Schuyler not been appointed, the court can envision the Cayuga now arguing that the State acted in bad faith by *not* appointing this individual who seems to have been so well-suited to carrying out the duties set forth in the 1795 Act.

Richardson's situation was more tenuous given his relative lack of qualifications. There is ample proof in the record that he did not have the stature, politically, militarily, or socially that Schuyler did. Richardson was a yeoman who had a "major interest" in the Cayuga lands at the same time he "was appointed a commissioner to treat for the state's purchase of the reservation." *See* Tr. at 2979. The State's historian openly admitted that the extent of Richardson's involvement is "disturb[ing] . . . from a modern vantage," because earlier Richardson had been expelled from Cayuga

lands by order of Governor Clinton, and his earlier private lease with the Cayuga had been declared illegal by the State, still he is appointed an agent of the State. *See id.* at 5138. Still, the court does not believe that judging Richardson's conduct in historical context, his appointment amounted to a conflict of interest reflective of the State's bad faith. There is nothing in the record showing that Richardson actually participated in the 1795 Treaty negotiations, but he did sign that Treaty. His subsequent purchases at the 1796 auction do not evince bad faith because that auction was public; and as with Brooks and Cantine, there has been no showing that Richardson actually participated in the 1795 Treaty negotiations. Schuyler's role was to negotiate with the Cayuga, which is understandable given his prior relevant experience. There is no basis for finding that Richardson somehow subordinated the Cayuga's interests to his own. Last, but not least, again keeping in mind the historical context, the Commissioners' mandate under the 1795 Act was to promote the interests of the Indian Nations enumerated therein. As Dr. von Gernet persuasively testified, in 1795 "purchasing the lands that the [Cayuga] ha[d] been trying to dispose of for many years[]" could even be viewed as tending to promote the Cayuga's interests, even in if retrospect it might not be viewed that way. *See* Tr. at 5161-62; *see also* Tr. at 5141-42.

4. Sale of Former Cayuga Lands

The issue of whether the State failed to act in good faith in connection with its sale of Cayuga Reservation lands at the 1796 public auction need not detain the court for long. It is undisputed that by its express terms the 1795 State Act provided that the State would purchase the Indian lands for what was the equivalent

of only 50 cents per acre, whereas such lands were to be sold by the State for no less than the equivalent of $2.00 per acre. *See* St. exh. 48 at 616. Consequently, inherent in that statutory scheme was a profit for the State. Given the prices mandated under the 1795 Act, the *State's minimum profit* was to be *four times* that of its *original* purchase *price*. Based upon that statutorily anticipated minimum profit, the State's lack of good faith is virtually self-evident, even if it never actually realized a profit.

This is not the first time the State has been condemned for this 1795 Act which was *anything but* what it professed to be-an Act "for the better support" of the Cayuga and the other two Indian Nations named therein. Not only did the 1795 Act contain a built-in profit for the State, but when the Cayuga Reservation lands were auctioned by the State in November 1796, it realized an even greater profit. Perhaps the most damaging evidence of the State's lack of good faith in this regard comes from the State itself. The Council of Revision vetoed or "disapproved," the 1795 legislation on the basis, *inter alia*, that "three-quarters of the land ceded would go for the benefit of the State and not over one-quarter for the benefit of the Indians." *See* Gov. exh. 375 at 141 and 142. In some respects the Council of Revision was prescient when it vetoed that Act because, among other reasons, essentially that Act was a revenue generating mechanism for a new State anxious to establish and extend itself in the new Republic. *See* Gov. exh. 375 at 142. Indeed, in a proceeding 114 years after the fact, that is what the State Board of Land Commissioners found; that the State had realized a profit of $247,609.33, or an average price of $4.50 per acre, or $2.50 per acre *more* than the statutory mini-

mum. *See* Gov. exh. 374 at 74-77. The fact that the 1795 Act authorized the State to purchase the Cayuga lands at a profit, coupled with the fact that the State realized even a greater profit than anticipated under that Act, readily convinces this court that the State did not act in a manner even approaching good faith. Not only did the State pass this improvident Act in the first place (and in so doing overrode the Council of Revision's soundly reasoned veto), but it then proceeded to enter into the 1795 Cayuga Ferry Treaty under the authority of that same Act.

5. Adequacy of Consideration

Closely related to the issue of the State's subsequent sale of the Cayuga lands, is the issue of whether the Cayuga received adequate consideration for their lands under the payment provisions of the 1795 Treaty. From the U.S.' perspective, the consideration which the State paid for the Cayuga Reservation was "unconscionable" and "grossly unfair[,]" and hence supports a finding of bad faith on the part of the State. *See* U.S. Pre-Tr. Memo. at 23; U.S. Post-Tr. Memo. at 30; and U.S. Resp. at 23. The State offers three reasons as to why the court should not impute bad faith to it on the basis of this allegedly inadequate consideration. None of these reasons are valid, however, especially considering the abundance of proof demonstrating that the Cayuga were *not* adequately compensated for the land which they ceded to the State under the 1795 Cayuga Ferry Treaty. This proof includes the State's recognition, in later years of the inadequacy of the 1795 consideration which it paid the Cayuga. *See, e.g.*, Gov. exh. 464 at 2; Gov. exh. 375 at 141-43.

The State first urges the court to use "contemporary history" of the U.S.' acquisition and resale of Indian

lands "as the measuring stick for the reasonableness of New York's dealings with the Cayuga[.]" St. Reply at 19. Under that standard, the State asserts that its 50 cents per acre payment to the Cayuga "was far from unconscionable." *Id.* There is a basic flaw with this argument. It is difficult to see how the U.S.' sale of western Indian lands made in accordance with federal law in "contemporary" times is relevant to this 1795 transaction.

The State fares no better with its second argument. The State is urging the court to assess the adequacy of the consideration paid the Cayuga by applying real estate valuation principles, many of which were developed during Phase I of this litigation. Relying upon such principles, the State vigorously disputes that it ever made a profit from the sale of the former Cayuga lands. There is no need for the court to engage in such an analysis, however. The terms of the 1795 Act itself, coupled with the profit realized by the State a year later, are sufficient to show that while perhaps not "unconscionable," the consideration paid by the State in 1795 was *not* adequate. Indeed, regardless of what transpired at the 1795 Treaty negotiations, the State had the "upper hand" entering those negotiations in at least one very important respect: The 1795 Act only authorized the Commissioners to pay 50 cents per acre for the purchase of the Cayuga lands. Therefore, whether or not the State actually realized a profit, the terms of the 1795 Act and the fact that private landowners were willing to bid nine times the price which the State paid to the Cayuga, support a finding that the Cayuga received inadequate consideration in 1795. *See* Gov. exh. 362 at 59.

Third, the State argues that the U.S.' silence following the 1795 Treaty, not even "hint[ing] that the transaction was deemed to be unconscionable," undermines the U.S.' argument today that the consideration was unconscionable. *See* St. Reply at 19. The court disagrees. The U.S.' silence in the aftermath of the 1795 Treaty is troubling in more ways than one, but it does not provide a basis for finding that the Cayuga were adequately compensated for their land in 1795, especially when all of the evidence points to the contrary.

The weakness of the State's arguments is exacerbated by the State's own acknowledgment in later years as to the inadequacy of the consideration which it paid to the Cayuga in 1795. After the Cayuga presented several memorials to the State between the mid-1800s and the early 1900s, in 1907 the Legislature authorized the Cayuga to present their claim that they had not been sufficiently compensated to the State Land Board. The Board, in turn, appointed a Special Investigator, Joseph Lawson, Esq., who reported to the Board, among other things, "that the annuity now received by . . . [the] Cayuga nation . . . is *not* an *equitable, just* and *fair annuity*, in view of the *large profits made* by the *State* . . . on the purchase and sale of lands formerly belonging to [the] Cayuga Nation[.]" *See* Gov. exh. 374 at 77 (emphasis added). The Board adopted Lawson's report in full, including the just quoted finding. *See id.* at 79. Particularly in light of the State's own acknowledgment, albeit after-the-fact, of the inadequacy of the 1795 consideration which it paid to the Cayuga, the court finds no basis for holding that the State acted in good faith with respect to the amount of that consideration.

After examining the vast and comprehensive historical record pertaining to the 1795 Cayuga Ferry Treaty, which included an abundance of evidence providing the backdrop for that Treaty, the court finds as follows with respect to the State's purported good faith in that regard.

There were a number of historical events upon which the parties heavily focused in an effort to show the State's good faith or lack thereof. Not all of those events are directly relevant to the fundamental issue of the State's good faith though. For instance, the Sullivan-Clinton Campaign did not advance the State's assertion that it acted in good faith, particularly as to the Cayuga, because that battle was essentially retaliation for the events at Wyoming Valley; such battles are an unfortunate but predictable by-product of any war; but events such as those did assist in providing a historical context for the 1795 Treaty. Thus those events outlined herein to stress the importance, indeed the necessity, of looking at the "big picture" when examining events which occurred hundreds of years ago, and where there are no witnesses with first-hand knowledge of these events.

An examination of *all* of the circumstances surrounding the 1795 Treaty, including the proof which was thoroughly developed as to the Cayuga's and the State's roles in historical events such as the American Revolution, persuades the court that the State was *not* motivated by a deliberate intent to cheat or defraud the Cayuga in relation to those two Treaties. Nor does the record support a finding that the State at that time *wilfully* violated the Nonintercourse Act. In fact, in sharp contrast to *Wickham*, 955 F.2d 831, there "is [*not*] every indication . . . that the [State] knew it was

clearly violating a specific statutory duty created by the [Nonintercourse Act]." *See id.* at 839 (emphasis added). As previously discussed, at a minimum the State had a general awareness of the Nonintercourse Act prior to executing the 1795 Treaty. But the present record does not establish that Jay, Clinton, or any other high-ranking State official was aware of a *specific* statutory duty imposed upon the State by the Nonintercourse Act, especially with respect to this 1795 land cession. Likewise, there is insufficient evidence to support a finding that the State engaged in a "blatant scheme to defraud" the Cayuga when it entered into the 1795 Treaty. *Cf. Drexel Burnham*, 837 F.Supp. at 609 (ordering two repeat offenders in a securities law action to pay prejudgment interest where they had engaged in such a scheme, and where they had repeatedly refused to acknowledge the wrongfulness of their actions).

There is more than enough proof in the record, however, to support a finding that in several critical ways the State of New York did exhibit a lack of good faith in its dealings with the Cayuga during the relevant time frame. The first such instance occurred in 1789. In July, 1788, the State ratified the U.S. Constitution which explicitly provides: "*No State* shall enter into any Treaty[.]" U.S. CONST. art. 1, § 10 (West 1987) (emphasis added). The Constitution also explicitly grants treaty making power to the U.S. President, "with the Advice and Consent of the Senate[.]" *Id.* art. 2, § 2, cl. 2. Given the State's ratification of the U.S. Constitution in 1788, presumptively it should have been aware of those two provisions when it entered into the Treaty of Albany with the Cayuga Lake minority less than a year later, in February 1789. Yet, disregarding

that unequivocal constitutional language, the State, not the Federal Government, and not the U.S. President, entered into the 1789 Treaty without the "Advice and Consent of the Senate[.]" *See id.* The State's brazen disregard of the U.S. Constitution significantly undermines its assertion that it acted in good faith as to this 1789 Treaty.

Turning to the 1795 Cayuga Ferry Treaty, the plaintiffs offer a host of different reasons which they argue are indicative of the State's lack of good faith in relation thereto, and which have already been discussed at some length. To quickly summarize, the record does not support a finding that the State displayed a lack of good faith during the 1795 negotiation process itself. For the reasons set forth herein, neither the availability of alcohol, the purported "bribes," nor the alleged cultural misunderstandings support a finding that the State failed to act in good faith with respect to those negotiations. Likewise, there is no merit to plaintiffs' claim that the State did not exercise good faith in the 1795 negotiations because it negotiated with the Cayuga majority faction, as opposed to the Cayuga Lake faction. This is just another example of the Cayuga's continuing inability to present a united front to the State insofar as their lands were concerned.

That said, one of the most flagrant examples of the State's failure to act in good faith arises in connection with the 1795 Treaty itself; that was the State's passage in the first place of the 1795 Act, which authorized it to proceed with treaty making to obtain lands from three member Nations of the Iroquois Confederacy, including the Cayuga. As should be readily apparent by now, in this court's opinion, that Act was nothing more than a transparent attempt on the State's part to gen-

erate revenue at the expense, both economically and otherwise, of the Cayuga. The State's passage of this Act is all the more disconcerting given that the Council of Revision, of which Governor Clinton was a member, vetoed this Act because, among other reasons, "it was improper to become a law since it was *not in the best interest of the Indians*[.]" *See* Gov. exh. 363 at 464 (internal quotation marks and footnote omitted) (emphasis added). The Council further reasoned that the 1795 Act "did not live up to the promises made by both houses of the legislature in concurrent resolution" the preceding year. *See id.* That Resolution stated:

> His Excellency the Governor, was requested to confer with the Indians then in the city of Albany, and to give them the fullest assurances of the continued friendship of the State towards their brethren the Six-Nations, and that the legislature would protect and secure them in the possession and enjoyment of their reservation, according to the agreements made with their several nations, and were ready to make any further disposition thereof for their *sole* benefit, when the wishes of their respective nations shall be made thereon for that purpose.

Id. at 464-65 (internal quotation marks and footnote omitted).

Even in the face of that 1794 Resolution and the Council of Revision's veto of the 1795 Act, first the State Senate and then the State Assembly overruled that veto. They did so despite the fact that it is difficult to imagine legislation which was more contrary to that earlier Resolution by the State than the 1795 Act. That 1795 Act was not for the *benefit* of the Cayuga, as it

purported to be, but rather it was an Act to the *detriment* of the Cayuga.

As to the 1795 Cayuga Ferry Treaty itself, the State also did not act in good faith either as to its sale of the former Cayuga lands thereunder, or as to the consideration which it paid for those lands. Because the 1795 Act provided for a sizeable profit to the State, the profit scheme inherent in that legislation manifests the State's lack of good faith regarding its subsequent sale of the Cayuga's land. In addition, the record is replete with references in several forms, such as the Council's reasons for vetoing the 1795 Act, and in later proceedings before the Land Office Board, as to the State's self-serving profit motive in passing this legislation, and the profit which it realized.

There is one other facet of the 1795 Treaty which bolsters the court's conclusion that the State did not act in good faith with respect thereto, and that is the scope of the State's knowledge of the requirements of the Nonintercourse Act prior to its execution of that Treaty. In its earlier discussion of this factor, the court found that the State had a general awareness of the Nonintercourse Act, but that the record is unclear as to the extent of that awareness, especially as it relates to the 1795 Cayuga Ferry Treaty. The court emphasizes, however, that when it made this finding it did so in isolation. Stepping back and viewing the totality of the evidence in historical context, however, reveals that the State's failure to comply with the Nonintercourse Act, despite its *general* awareness of the same at the time, was an act which was not wholly innocent, especially given the State's overt profit motive. To conclude, although the court cannot find that the State willfully violated the Nonintercourse Act, there is sufficient evi-

dence in the record to show that it acted in calculated disregard of that federal statute; and such calculated disregard is not indicative of good faith.

N. 1807 Treaty

The State's treaty making did not end in 1795. Prior to the 1807 Treaty, in addition to the treaty with the St. Regis, the State entered into several other treaties with other member Nations of the Iroquois Confederacy. In 1798 and again in 1802, the State entered into two separate treaties with the Oneida, both of which satisfied the Nonintercourse Act. At the time of this first Oneida Treaty, in 1798, John Jay was still governor of New York State. And, as already discussed, at least as late as September 1, 1795, he demonstrated an understanding both of the requirements of the Nonintercourse Act and of the fact that the State could not proceed alone in that regard. *See* St. exh. 740 (Jay letter to Pickering regarding impending St. Regis Treaty wherein Jay advised Pickering that the State had made all the necessary arrangements, but wanted an immediate response from the U.S. as to appointment of its commissioners because the State's proceedings were "necessarily . . . suspended until [Jay] receive[d] [the U.S.'] answer[]").

In addition to that St. Regis Treaty in 1789, while Jay was still governor, the State entered into a treaty with the Oneida. Plainly that treaty was in compliance with the Nonintercourse Act, as it states thereon that "Joseph Hopkinson Commissioner appointed under the authority of the [U.S.]" was "PRESENT[.]" Nat. exh. 16 at 249. He also executed that treaty, *see id.* at 251, which was subsequently ratified by Congress. *See* Nat. exh. 61 at 24. And although Clinton had resumed the governorship by 1802 when the State entered into the

second Oneida Treaty which is part of this record, *see* Tr. at 3923, that treaty, too, was entered into in compliance with the Nonintercourse Act. There was a federal presence at that 1802 Treaty: "John Tayler Agent appointed under the authority of the [U.S.] to hold the Treaty[.]" *See* Nat. exh. 17 at 256. Tayler also executed that Treaty and it too was subsequently ratified by Congress. *See id.* at 257; and Nat. exh. 61 at 24. Thus, the record firmly establishes that the State entered into at least two, perhaps three, separate treaties for cessions of Indian lands prior to its 1807 Treaty with the Cayuga; and at least two of those treaties fully complied with the Nonintercourse Act. The foregoing demonstrates the State's awareness, not just generally but specifically, as to the proper procedures to be followed under the Nonintercourse Act, yet, the State again, in 1807, failed to follow that procedure with respect to the Cayuga.

After the 1795 Treaty, the Cayuga Nation began to disperse even more. Some continued to live at Cayuga Lake, but others went to Buffalo Creek or across the Canadian border to Grand River, places to which other Cayuga had previously moved. *See* Gov. exh. 362 at 63. Although the proof is not definitive, it shows that in all likelihood at least by 1800, if not before, there were no Cayuga remaining in the Cayuga Lake area. *See* Tr. at 3008-09; and St. exh. 623 at 59.

Because so many of the Cayuga had left their former homeland, and because they were in dire financial straits, it is no surprise that in 1799 and again in 1807 some of them approached the Governor regarding the sale of what remained of their once relatively sizable homeland. In the summer of 1799, Governor Jay informed U.S. Superintendent of Indian Affairs Israel

Chapin that "a considerable part of the Cayuga Tribe wished to sell their reserved Land [.]" St. exh. 65; and Tr. at 3494. Because "a number" of Cayuga opposed that sale, Jay was hesitant to pursue this request. *Id.* Jay was amenable though if "reasonable [t]erms" could be reached, and if a stipulation could be agreed upon whereby "a specified portion of the purchase money should be paid to the one party, and the residue to the other party." *Id.*; and Tr. at 3494-95. In that way, Jay desired to appease both "the mas of the Tribe [who] [we]re anxious to sell, and . . . [he] small party who [we]re jealous lest Injustice . . . be done them." *Id.*; and Tr. at 3495. Accordingly, Jay instructed Chapin to determine if the Cayuga could agree amongst themselves on this sale, and to see what "would be the lowest Terms on which they would sell." *Id.* Evidently based upon prior experience, Jay frankly informed Chapin that if the Cayuga could not agree, then he "doubt[ed] the Expediency of buying the Land of the Majority, and being afterwards troubled with the Remonstrances & Discontents of the minority." *Id.*

Apparently nothing came of the Cayuga's 1799 request. But the next year, in the early summer of 1800, Chapin reported to Jay that "the whole Cayuga Tribe" had moved westward, and Chapin was planning to meet with "a number of their Chiefs[,]" who were still interested in selling the remaining portion of their Reservation. *See* St. exh. 66. Jay wrote Chapin that if the Cayuga would "*all unite* in the sale" of that land, the State would buy it, provided the price was fair and in the best interest of the public. *Id.* (emphasis added). Jay observed that the price the State would be willing to buy would be affected by the relatively small size of the remaining land, and the State's expenses, such as the cost

of a "national Commissioner[.]" *Id.* Jay again instructed Chapin to ascertain what would be the lowest price for which the Cayuga would agree to sell. *See id.*

Record proof as to what transpired between that second request by the Cayuga in 1800, and the State's 1807 agreement in principle to purchase those remaining Cayuga lands is practically non-existent. *See* St. exh. 623 at 60; *see also* Tr. at 3496. The proof does show, however, that on February 26, 1807, Governor Morgan Lewis, two members of the "Cayuga Tribe," and "their interpretor [sic] Josfe [sic] Parish Esquire[] . . . , the Superintendant [sic] of Indian affairs in this State[,]" executed an agreement wherein the State agreed to purchase nearly all of the remaining Cayuga lands,[21] roughly three square miles, totaling 3,200 acres. *See* St. exh. 50 at 1 and 3. The payment terms for one lump sum payment of $4,800.00 or $1.50 per acre, *id.* at 2, thus leaving the Cayuga "without a home in New York State [.]" *See* Tr. at 3009; and 4145; Gov. exh. 374 at 19. That principle in agreement did not take the form of a treaty, however, until May 30, 1807. *See* St. exh. 52 at 229. Even though the Cayuga received only $4,800.00 for that land, later in that same year those former Cayuga lands were appraised "at approximately $14,899.41[.]" *See* Gov. exh. 374 at 19; and Tr. at 3009.z

Like the 1795 Treaty, this court has previously held that this 1807 Treaty was not "ratified by the federal government in accordance with Article II, Section 2 of the U.S. Constitution," and hence plaintiffs established

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[21] Approximately 34 years later, the State completed its purchase of all Cayuga lands when it purchased the one square mile lot which had been reserved for Fish Carrier in the 1789 Treaty of Albany. *See* Gov. exh. 362 at 66.

a *prima facie* case of a Nonintercourse Act violation. *See Cayuga IV*, 730 F.Supp. at 489. And also as with the 1795 Treaty, the court's earlier holding remains the law of the case. *See Aramony*, 254 F.3d at 411. Therefore, the court need not revisit the issue of the validity of the 1807 Treaty under the Nonintercourse Act, despite the Cayuga's contention, through Dr. Hauptman, that the State's bad faith here is due, *inter alia*, to the absence of a federal commissioner. *See* Tr. at 4146. There is evidence in the record, though, which easily supports a finding that the State acted in bad faith regardless of whether or not a federal commissioner was present.

The State contends that it did act in good faith in negotiating this 1807 Treaty because, as improbable as it might seem, the State depicts that Treaty as "keeping with [its] longstanding policy of protecting the interests of the Cayuga minority . . . , at the hands of the Cayuga majority who had been intent on selling the [R]eservation ever since it[s] . . . creat[ion] in 1789 [.]" *See* St. Ph. II Memo. at 12. As has been its strategy throughout this litigation, the State attempts to divert attention away from its own actions by pointing the finger at the Federal Government, declaring: "The [U.S.,] through its duly appointed Indian agent, transmitted the Cayuga's request to make the sale to the State, was fully aware of all details of the transaction, participated in its fruition, and signed the [1807 Treaty.]" *Id.* at 12-13.

The court's attention cannot be so easily diverted. The State is conveniently ignoring the record evidence showing that it was fully aware of the Nonintercourse Act requirements by 1807, but it still did not abide by that Act with respect to this 1807 Cayuga Treaty,

which Congress has never ratified. The State is also overlooking the fact that as with the 1795 Cayuga Ferry Treaty, the consideration which it paid the Cayuga in 1807 for nearly all the rest of their homeland was inadequate, as is evidenced by the fact that the State bought that land for $1.50 an acre, and shortly thereafter it was appraised at approximately $4.50 an acre. Given the State's knowledge of the Nonintercourse Act by 1807, the State certainly cannot be said to have acted innocently when it failed to comply therewith. In fact, an inference can be drawn from the proof that the State knew, or should have known of the necessity of complying with the Nonintercourse Act when entering into land cessions with Indians.

O. 1807 Onward

So far, in ascertaining the State's good faith or lack thereof the court's analysis has been dominated, as was Phase II, by events which happened mostly in the late 18th and early 19th centuries. Plaintiffs' claims of bad faith do not end with the 1807 Treaty, however. They argue that the State continued to act with bad faith in the immediate aftermath of the 1795 and 1807 Treaties, and has continued to do so well into the 20th century. Primarily this argument is based upon the Cayuga's repeated efforts, beginning in 1853, to attempt to get additional recompense from the State for the cession of its homelands to the State in 1795. Although not stated in exactly these terms, the thrust of this argument is that the State acted in bad faith by rebuffing these efforts nearly every step of the way. A related argument by the plaintiffs is that the court should not reduce or limit the amount of prejudgment interest based upon laches or the delay in commencing this lawsuit because any

such delay is not attributable to the Cayuga-they commenced this lawsuit at the first available opportunity.

The State counters that it has made a "substantial showing" of its good faith in its dealings with the Cayuga from 1807 onward, and plaintiffs have failed to rebut that showing. *See* St. Reply at 30. Further argues the State, "plaintiffs have failed adequately to explain or justify their long and unreasonable delay in bringing the present action[.]" St. Reply at 41.

The record contains considerable proof as to the Cayuga's efforts, beginning in 1853, and continuing right up until the filing of this lawsuit in 1980, to "make their voice heard" with respect to the sales to the State of their homelands in 1795 and 1807. It is not necessary for the court to go into the minutia of the Cayuga's efforts and the State's responses thereto (although the parties did, both in terms of the evidence proffered and in their briefing of the related legal issues), to resolve the bad faith and delay issues which are being raised at this juncture. The necessity of such an in- depth examination of this proof is further obviated by the fact that the record facts which form the basis for both of these arguments are nearly identical, and largely undisputed. *See* U.S. Resp. at 8. Thus what follows are highlights of both the Cayuga's attempts to receive compensation from the State for the past approximately 150 years, and the State's responses thereto.

The Cayuga's efforts began in 1853 when Dr. Peter Wilson, "a well-educated Grand Sachem of the Six Nations," *see* Gov. exh. 600, at 6, ¶ 5(h) (internal quotation marks and citation omitted), first petitioned the State Legislature on their behalf, by presenting a Memorial seeking the difference between the amount for which the State subsequently sold their land and the amount

which the State originally paid to the Cayuga. *See* St. exh. 631. Dr. Wilson resubmitted that Memorial to the State Legislature in 1861. *See* Gov. exh. 460. The State refused to appropriate funds, *see* Gov. exh. 445, exh. 5 thereto at 2, in spite of the fact that the State Senate's Committee on Indian Affairs found that the Cayuga should be further compensated for the sale of their lands. *See* Gov. exh. 464. The Committee offered a number of reasons for this recommendation, including the Legislature's previous "appropriat[ion] [of] large sums in liquidation of the claims of other Indian tribes, resting upon precisely similar grounds." *See id.* at 3.

Undeterred, in the early 1900s the Cayuga retained an attorney to "investigate the possibility of legal action in connection with the 1795 land sale." *See* Gov. exh. 600, at 11, ¶ 5(y). Eventually with the assistance of counsel who prepared another Memorial, three New York Cayuga Chiefs submitted it to the State Legislature in early 1906. *See id.* (citation omitted); *see also* St. exh. 633. Shortly thereafter, the State's Attorney General issued an opinion concluding that the Cayuga's claim, as set forth in that 1906 Memorial, "surviv [ed] any lapse of time," but was a claim over "which no court had jurisdiction[.]" St. exh. 635 at 2. As authorized by an act of the State Legislature, the State Land Board appointed attorney Joseph Lawson to investigate that same Memorial. *See id.* In Lawson's 1908 "Opinion," he made a number of findings, including that "there rests a moral obligation" upon the State "to make further provision for the support and maintenance" of the Cayuga "based upon a consideration of . . . [the] sum of $247,609.33 as the profits realized by the State . . . from the sale" of the Cayuga's former homelands in 1795, but that amount was "in no sense a measure of

damage sustained by [the] Cayuga by reason of [the State's] purchase." *See* Gov. exh. 374 at 77. Based upon these findings, Lawson recommended that an act be prepared to submit to the State Legislature "empowering" the State Land Board to enter into negotiations with the Cayuga for "a just and equitable disposition of" the 1906 Memorial. *See id.* at 78. Eventually the State Legislature passed an act authorizing settlement, *see* Gov. exh. 375 at 29-32; and the State Land Board and the New York Cayuga agreed upon a "proposed settlement of $297,131.20[.]" *See* Gov. exh. 600 at 13, ¶ 5(hh). That settlement was never finalized however.

The Cayuga persisted. When the State Land Board refused to cooperate in further settlement attempts, in January 1913, they sought a writ of mandamus compelling it to negotiate, *see* Gov. exh. 445, exh. 35 thereto, and that relief was granted. After the issuance of that writ, the State agreed to payment of additional annuities, but those payments were discontinued in 1918. From 1913 onward the Cayuga persevered through various avenues within the State bureaucracy. Some of the disputes during that time regarded annuity distribution among the Cayuga, which had been a subject of contention even in the late 1700s. It was not until 1958, however, that the State finally passed into law an act authorizing settlement with the Cayuga. *See* Gov. exh. 600 at 22, ¶¶ 5(mmm) (citing Chapter 918 of the Laws of 1958). Throughout this time period, for all intents and purposes, basically the Cayuga were foreclosed from pursuing relief in state courts. Moreover, it was not until the Supreme Court's landmark decision in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974), that the federal courts became available to Indian Nations making

Nonintercourse Act claims of the type which the Cayuga are asserting in this lawsuit. Reversing the lower courts, in 1974, for the first time, the Supreme Court recognized that Nonintercourse Act claims such as the Cayuga's claims herein do present a federal question "[g]iven the nature and source of the possessory rights of Indian tribes to their aboriginal lands, particularly when confirmed by treaty[.]" *Id.* at 667, 94 S.Ct. 772.

1. "Bad Faith"

Keeping in mind that the State has the burden of proving its good faith, the court finds that it has not satisfied that burden here. The record does support a finding, as the State urges, that ultimately the Cayuga did succeed, through legal and political means, in gaining additional compensation in the form of increased annuity payments, which the State has continued to pay through the years. It does not necessarily follow from such a finding, however, that the State acted in good faith in its dealings with the Cayuga in the post-Treaty years.

In arguing that it acted in good faith because eventually the Cayuga received additional compensation from it, the State is ignoring two important points. Assuming *arguendo* the adequacy of those increased annuity payments, the State is ignoring the length of time it took the Cayuga to finally receive those payments. It did not take the State a few years, or even a few decades to make those payments; it took over 100 years. And while some of that time is understandable given the delay inherent in most political processes, there is evidence in the record that a substantial portion of that delay is attributable to the State, which often times refused to acknowledge its obligations to the Cayuga. *See, e.g.* Gov. exh. 445, exh. 35 thereto at 4 (Supreme

Court State Land Office "wholly neglected failed and refused" to negotiate with the Cayuga as required by a State law). The State is also ignoring the fact that the court must, as it has done throughout Phase II of this litigation, view the State's treatment of the Cayuga post-1807, not in isolation, but in the larger context. When that is done, there is simply no basis for finding that the State's actions in those later years were taken in good faith.

By the mid-19th century, as the evidence makes abundantly clear, the State was aware or should have been aware of its previous Nonintercourse Act violations, at least as to the 1807 Treaty. More important is the fact that practically since the Cayuga presented their first Memorial in 1853, various State officials and State entities recognized, time and again, that the Cayuga had not, to put it bluntly, been treated fairly by the State, and hence the State at least had a moral obligation to rectify that wrong. The record from this time period is also filled with acknowledgments by the State that essentially it took advantage of the Cayuga in 1795. *See, e.g.*, Gov. exh. 464 at 2 (1861 State Committee of Indian Affairs reporting that "[w]hile the State was . . . , encouraging the Indians to emigrate to the then far west, extinguishing their titles to their lands, and then disposing of those lands for much larger sums than they had cost, the Cayugas, in common with other tribes, experienced all the evils, without any of the benefits of that civilization before whose majestic stride they are forced to recede.") And although the State was not obligated to treat all Indians within its borders the same, the State's willingness to recognize its "moral obligation" with respect to others, such as the Stockbridge Tribe of Indians, *see* Gov. exh. 374 at 76, renders

the State's refusal to promptly do the same with the Cayuga all the more questionable.

In an effort to show its good faith, the State challenges both the type of relief which the Cayuga sought in the various State proceedings, as well as the nature of the claims asserted therein. The fact that the Cayuga are now seeking greater and/or different relief than they previously sought from the State does not change the court's opinion that the State did not act in good faith in its handling of the Cayuga's various claims in the post-Treaty years. Equally specious is the State's attack on Dr. Wilson for his failure to challenge the validity of the underlying Treaties, and instead only seeking additional compensation for the Cayuga. The nature of the claims being made does not excuse the State's conduct. Finally, when viewing the State's entire course of dealing with the Cayuga, its treatment of the Cayuga since 1807 is simply a continuation of its poor treatment of the Cayuga in the preceding years. Even if the court were to find that the State acted in good faith in the post-Treaty years, given the current state of the record in terms of its lack of good faith prior thereto, a subsequent finding of good faith would not change the court's analysis of the prejudgment issues herein.

2. Delay

The Cayuga argue that the court should "give little, if any, weight to any such evidence [of laches]" as a "possible basis for reducing the amount of prejudgment interest to which [they] may be entitled." Cay. Pre-Tr. Memo. at 8. In making this argument, the Cayuga contend that "laches cannot be imputed to a party who lacks the authority to seek legal redress[,]" and because "until the mid-20th century no federal or state court

could have asserted jurisdiction over the type of tribal claim brought by the plaintiffs [here]in[,]" it would have been "futile" for them to have pursued a lawsuit of this type. *See id.* at 8; 9; and 14. Put somewhat differently, the Cayuga are arguing that if there was a delay in bringing this lawsuit, it was not unreasonable due to the foregoing, and likewise not attributable to them because they commenced this action at the first available opportunity. Conversely, the State argues that the Cayuga "were fully capable of pressing their claims, but simply chose to pursue types of relief other than those sought in this lawsuit[,]" St. Reply at 41, and thus the court should deny or reduce prejudgment interest on the basis of this delay.

"[A]n equitable consideration such as laches can[ ] bar an otherwise valid claim for [prejudgment] interest[.]" *West Virginia v. U.S.*, 479 U.S. at 311 n. 3, 107 S. Ct. 702 (citation omitted). As this court recognized earlier in this litigation, in the context of the availability of ejectment as a remedy, there are two essential elements to laches, "unreasonable delay committed by the plaintiff and prejudicial consequences suffered by the defendant." *Cayuga X*, 1999 WL 509442, at *25 (internal quotation marks and citation omitted). The parties did not address this second factor, perhaps because the prejudice to the State is so patently obvious. If laches or delay does not serve to bar, limit or reduce the Cayuga's prejudgment interest claim, then, based upon the conclusion of the Cayuga's economist that they are entitled to $1.7 billion in such interest, the prejudice to the State is clear.

The parties do dispute the issue of whether the delay of roughly 200 years between the time of the first "injury" arising from the 1795 treaty and the filing of this

lawsuit in 1980 is reasonable. The court cannot find that the Cayuga are responsible for any delay in bringing this action. The Cayuga's efforts to seek redress from the State for the loss of their homeland in 1795, as recounted above, attest to their perseverance and fortitude. Those efforts do not support a finding that the Cayuga should be denied prejudgment interest simply because they took advantage of the legal and political mechanisms available to them through the years. Furthermore, as this court has previously recognized, "protests, complaints and negotiations looking toward a settlement of the controversy go far to explain the reasonableness of the delay." *Cayuga X*, 1999 WL 509442, at *25. In short, the court finds that this delay was not unreasonable, insofar as the actions of the Cayuga are concerned. As will be seen, that does no mean, however, that the court will not take into account the passage of more than 200 years between the time of the 1795 treaty and the date upon which judgment will be entered. At this point in the litigation, and given the extraordinarily unique facts of this case, in the court's view, it is not significant which party, if any, bears the responsibility of this more than 200 year delay. What *is* significant is the passage of so much time. Irrespective of why, there has been a lapse here of more than 200 years between the time the Cayuga's rights were first violated under the Nonintercourse Act and the time of judgment, which has not yet been entered due to the procedural posture of this case. Suffice it to say for now that the passage of over two centuries is unprecedented in the context of prejudgment interest, and the court will take that into account in calculating prejudgment interest here.

In making a final determination as to whether the Cayuga are entitled to an award of prejudgment interest and the amount thereof, it is appropriate to briefly summarize the court's findings thus far. Prejudgment interest is necessary to fully compensate the Cayuga because not only did they sustain the loss of their homeland, for which the jury found they were entitled to compensation totaling $37 million, but they have sustained the additional loss of not having that compensation available to them over the years for investment or other purposes. At the same time, the court does not agree with the Cayuga that the purpose of such award is to augment or increase the jury's award because supposedly the jury verdict did not adequately compensate them. The fact that the Nonintercourse Act is essentially remedial in nature also augurs in favor of a prejudgment interest award herein as do considerations of fairness and the relative equities. The historical record before the court demonstrates all too vividly that the State did not act in good faith toward the Cayuga at the time of the 1795 and 1807 Treaties, but also on subsequent occasions throughout the 200 years under consideration herein. In sum, the *Wickham* factors undoubtedly warrant a grant of prejudgment interest in favor of the Cayuga.

Since the issue of prejudgment interest first arose, the amount of such an award has been the more challenging issue, primarily because of the extremely long interval between the time of injury and the entry of judgment here. Therefore, even though the economic evidence was not nearly as extensive or comprehensive as the historical evidence, calculating prejudgment interest in this case raises its own complicated issues.

The prejudgment interest issues herein are novel because this lawsuit is novel, indeed practically unprecedented (at least in terms of the remedy phase), in that the wrongs complained of occurred over two centuries ago.

Prejudgment interest is commonly awarded in a variety of contexts, such as on back pay awards in Title VII actions, *see, e.g., Gierlinger v. Gleason*, 160 F.3d 858, 874 (2d Cir. 1998); in Securities and Exchange Commission proceedings, *see, e.g.,"S.E.C. v. Warde*, 151 F.3d 42 (2d Cir. 1998); and on claims for unpaid benefits for violations of Employee Retirement Income Security Act, *McDonald v. Pension Plan of NYSA-ILA Pension*, 153 F. Supp.2d 268, 297 (S.D.N.Y.2001), to name a few. Despite the frequency with which such awards are made, analysis as to how those awards are determined has received relatively little attention from the courts. Consequently, in analyzing the unique prejudgment issues before it, not only has the court been confronted with an extremely difficult and unusual set of facts, but case law has not been particularly instructive.

Economic Evidence

During Phase II, in addition to the three historian experts, the court heard the testimony of three expert economists: Peter Temin, Ph.D., currently the Elisha Gray II Professor of Economics at the Massachusetts Institute of Technology ("MIT"), on behalf of the Cayuga; Mark P. Berkman, Ph.D., Vice President, National Economic Research Associates, Inc., on behalf of the U.S.; and Dr. Grossman, identified earlier, on behalf of the State.

The three economists arrived at different conclusions as to the amount of interest to which the Cayuga may,

or in the case of Dr. Grossman, the amount to which they may *not* be entitled. Dr. Grossman, the State's economist, came to the conclusion that it is actually the Cayuga who owe the State money. "[T]here is a huge gulf" between the economists insofar as these amounts are concerned. *See Cayuga XIV*, 2000 WL 654963, at *3. During Phase II it became apparent that although there is still a "huge gulf" as to the economists' conclusions, they have several significant areas of agreement regarding how to analyze the issue of prejudgment interest.

The economists agree, first of all, that in general an award of prejudgment interest is necessary to wholly compensate a plaintiff because such an award takes into account a plaintiff's lost opportunity cost, or the time value of money. And, as discussed earlier, this economic principle has been widely adopted by courts in calculating prejudgment interest.

In the present case, the necessity of compensating the Cayuga for lost opportunity cost is based on the proposition that if they had not been injured at the time in the amount the jury determined for each of the 204 years for which it awarded damage, they could have used or invested those funds. Without that money or property, they incurred lost opportunity costs with respect thereto. Accordingly, the Cayuga must be compensated for the lost opportunity cost of the money to which they did not have access through the years.

To calculate lost opportunity cost in this case, for example, it is necessary to find a measure of damages available to a person in 1795 (or other past year) who had the resources to invest. Depending upon the type of investment, however, the value of the money invested may increase or decrease. Generally bonds are

deemed to be relatively low risk, and thus yield lower interest rates. *See* Nat. exh. 64 at 9, ¶ 25. Stocks, on the other hand, ordinarily involve greater risk and thus have a higher rate of return. *See id.* Because there is no way to know what the Cayuga would have done with the property or money absent the Treaties in question there is no way to know the investment risk they would have taken in relation thereto.

The three economists also agreed that ordinarily compound as opposed to simple interest is preferred. Dr. Berkman emphatically stated, "from an economist's perspective, compound interest is *always* correct." *See* Gov. exh. 2 at 7, ¶ IV(E) (emphasis added); *see also* St. exh. 721 at 4, ¶ 10 ("[T]ypically economists . . . use compound interest in their calculations" because they "assume that any interest paid could be reinvested and, . . . , interest can be earned upon interest."). In a similar vein, Dr. Temin declared that compounding "is the *only way* to calculate the opportunity cost that makes any sense." *See* Nat. exh. 64 at 13, ¶ 36 (emphasis added). Again, this comports with basic principles of prejudgment interest jurisprudence.

The economists also agreed that the "risk-free" rate is the proper rate to be used here, *assuming* access to financial markets. As to this factor, Dr. Grossman challenged the opportunity cost analysis of both Temin and Berkman because, for one thing, in Grossman's view it is difficult to ascertain opportunity costs at the time in that access to financial markets was extremely limited in the last 18th and early 19th centuries. Thus, insofar as Temin and Berkman are assuming that financial markets were available, and that the Cayuga had access to them, Dr. Grossman questions that assumption.

As discussed earlier in the context of whether or not the jury verdict was inconsistent, a substantial portion of Dr. Grossman's testimony was devoted to his theory that the jury improperly compared "constant" and "current" dollars, using the definition of "current" dollars which evidently is generally accepted among economists, but is *not* the definition which the jury was instructed to use in Phase I. For the reasons previously set forth herein, because the court disagrees with Grossman's interpretation of the jury verdict, it also disagrees with his prejudgment interest calculations based upon his "adjustment" to the jury verdict. Even if the court agreed with Grossman's methodology, it would not apply that methodology in this case because to do so would render a truly untenable result. When Dr. Grossman did his own independent analysis of the jury's verdict, he concluded that instead of the State owing the Cayuga money for lost rent, it would be the other way around. That is so because Grossman's analysis "suggest[s] that the credits to the State exceeded the amount that damaged the plaintiffs in virtually every year." St. exh. 721 at 10, ¶ 26 (citation omitted). Furthermore, "[t]he implication" of assuming, as Grossman does, "that the jury expressed their verdict in constant 2000 dollars[,] . . . is that the State does *not* owe any damages for loss of past use and possession." *See id.* at ¶ 27 (emphasis added). In other words, strictly applying Grossman's economic based theory as to how the verdict, particularly with respect to lost rent damages, should be calculated would result in the Cayuga *owing* the State approximately $7.6 million dollars.[24] *See* Tr. at 6450-51; *see also* St. exh. 721, exh. 4 thereto at 25.

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[24] The State's assurances that it will not actually collect from

The court cannot countenance such a result, which in the context of the present case would be fundamentally *un* fair and *in* equitable. Requiring the Cayuga, the prevailing party, to pay the State, the defendant who has been found liable for $37 million, would erode the whole concept of prejudgment interest. The Cayuga would not receive full compensating because without any prejudgment interest whatsoever, they would not be compensated for the lost time value of their money. Furthermore, under this scenario potentially the State would be *re*warded in that it would effectively have had an interest-free loan for over 200 years.

Because the court is unwilling to follow Grossman's approach for calculating prejudgment interest, and given that he has recognized the validity of Berkman's and Temin's analyses, if the court does not accept his reading of the verdict, it will not consider Grossman's alternative calculation methods. In addition to Dr. Grossman, the State also relied upon its real estate appraisal expert, John D. Dorchester, Jr., who also testified during Phase I. Upon the U.S.' motion in Phase II to strike his testimony, the court limited Dorchester's testimony to possible prejudgment interest calculations, subject to a later determination of relevancy. *See* Tr. at 6128-29. After hearing Dorchester's testimony, and carefully reviewing his April 25, 2000 report (St. exh. 698), the court finds his prejudgment interest calculations irrelevant in that his underlying assumption is that the Cayuga received adequate compensation from the State in 1795, which the court has found is not so. Accordingly, Dorchester's opinion that the Cayuga sustained no lost opportunity cost, and hence "the State

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the Cayuga does not change the court's opinion that Grossman's analysis, using an "adjusted" jury verdict, is inappropriate.

would still owe the Cayuga[] a perpetual annuity, as originally agreed[,]" but nothing more is not valid. *See* St. exh. 698 at 4.

Anticipating that the court would disagree with his first assumption, Dorchester also presented a number of tables setting forth a variety of methods for calculating prejudgment interest, based upon several different possible accrual dates, interest rates, and calculations using both simple and compound interest. None of those calculations are applicable to the present case, however, and this court declines to consider them. Having decided that it will not use either Dr. Grossman's or Mr. Dorchester's calculation theories, next the court must consider the analyses of Drs. Temin and Berkman, which while similar are not identical.

Temin and Berkman calculated prejudgment interest taking into account inflation. *See* Gov. exh. 2 at 4, § IV, ¶ 4; and Nat. exh. 64 at 3, § III, ¶ 7. Both compounded the interest beginning in 1795; and both used a "risk-free" interest rate. A "risk-free" interest rate "measures" the "pure time effect [of money] precisely," and accounts for inflation since compounding interest alone will not. *See* Nat. exh. 64 at 9, ¶ 25. According to Dr. Berkman, "[m]any argue that a risk-free interest rate is appropriate because damages estimated at the time of loss should be neutral with respect to the risk faced by the plaintiff following the loss." *See* Gov. exh. 2 at 5, § IV, ¶ (C). As Dr. Berkman noted, the concept of risk-free interest is articulately expressed by Franklin Fisher of MIT:

> At first glance, it may seem that the plaintiff is entitled to interest at its opportunity cost of capital. . . After all, had the plaintiff received [the funds re-

> lated to the lost asset], it would have invested the funds, receiving presumably its average rate of return. . . . The fallacy here . . . has to do with risk. The plaintiff's opportunity cost of capital includes a return that compensates the plaintiff for the average risk it bears. But, in depriving plaintiff of an asset . . . the defendant has also relieved it of the risks associated with investment in that asset. The plaintiff is thus entitled to interest compensating it for the time value of money, but is not also entitled to interest compensating it for the risks it did not bear.

Id. (citing Franklin M. Fisher and R. Craig Romaine, "Janis Joplin's Yearbook and the Theory of Damages" in John Monz, Editor, *Industrial Organization, Economics and the Law, Collected Papers of Franklin M. Fisher*, Cambridge, MA: The MIT Press, p. 393). Relying upon Fisher's reasoning, Dr. Berkman opined that "a risk-free rate is appropriate here[.]" *Id.* at 6, § IV, ¶ (C). "Use of such a rate will result in a prejudgment interest award which properly accounts for the time value of money and inflation[,] [but] not for any risk faced by the plaintiff." *Id.* Moreover, "[b]ecause the risk-free market asset is . . . the one offering the *lowest* interest rate, . . . it will result in the *most conservative estimate* for [prejudgment interest] in this case." *Id.* (emphasis added).

Even though Berkman and Temin agreed on the use of a "risk-free" interest rate, they used different rates which accounts for their different results. In his analysis, Dr. Berkman used U.S. Treasury Bill rates or their equivalents, depending upon the time frame. From 1919 forward, he used the U.S. Treasury-Bill rate; but because prior to that year there is no "detailed history

of Treasury Bill and Bonds with specific terms[,]" he "used the lowest interest rate available in each year, whether that rate was issued by a municipal, state or federal government." *Id.* at 6, § IV, ¶ (D). This resulted in interest rates ranging from a low in 1940 of 0/01% to a high of 14.03% in 1981. *See id.*, exh. 2 thereto at 4.

Dr. Temin used the same methodology as Dr. Berkman; the only difference is in the rates used. Berkman explained this difference by the fact that Dr. Temin examined the overall market, while Berkman looked to the lowest rate. Dr. Temin expressed the interest rates he applied in terms of the "historical nominal risk-free rate[,]" which takes into account "the real rate of interest" [*i.e.*, the "rate after the adjustment for expected inflation] and the expected inflation rate." *See* Nat. exh. 64 at 16-17, ¶ 46.

Despite the similarities in methodologies, given the different interest rates, Dr. Temin, the Cayuga's economist, concluded that they are entitled to prejudgment interest totaling $1,749,963.279.00. *See id.*, exh. S3 thereto. Applying the annualized interest rates mentioned above, and compounding annually, Berkman concluded that as of June 30, 2000, the Cayuga were entitled to $527,500,817.00 in prejudgment interest. *Id.*, exh. 3 thereto.

Adopting Temin's methodology, which includes an accrual date of July 27, 1795, compounds interest and employs the historical interest rates mentioned above, yields a result which can only be described as exorbitant. The court does not fault Dr. Temin's methodology, but there is no justification for such an immense prejudgment interest award-$1.7 billion. When numbers become so large, at a point it is difficult to grasp

what a certain amount means in day-to-day life. To place Dr. Temin's prejudgment interest figure in perspective, "Lloyd's of London, the world's biggest insurance market, said . . . that it expected to face . . . $1.92 billion in claims . . . related to the [recent] terrorist attacks on the [U.S.], making it the most costly single calamity in Lloyd's 320-year history." Alan Cowell, *Lloyd's Expects Claims From Attacks to Top $1.9 Billion*, N.Y. TIMES, Sept. 27, 2001. The court stresses that it is making this observation *strictly* for illustrative purposes.

As has been repeatedly stated herein, one of the purposes of prejudgment interest is to fully compensate the injured party. Common sense dictates that such an award should not penalize the party causing the injury, however. Arguably at some point when a prejudgment interest award becomes so large, such as $1.7 billion, whether due to compounding, the interest rate, or simply the passage of time, it crosses the line from being full compensation and becomes an improper penalty. *Cf. Raybestos Products Co. v. Younger*, 54 F.3d 1234, 1247 (7th Cir. 1995) (under the Lanham Act courts have discretion to enter prejudgment interest which is "just," but is not a "penalty"); *but see "S.E.C. v. Antar*, 97 F. Supp.2d 576, 591 (D.N.J.2000) (a prejudgment interest award "no matter how large," cannot be called 'punitive[ ]' because defendants can invest the funds "during litigation and use the interest thereon to satisfy their prejudgment interest obligation"). An additional reason for not adopting Dr. Temin's calculations wholesale, with no adjustments, is that there would be a very real possibility of overcompensation. Given the equitable nature of prejudgment interest, courts "must be careful that [such] an award does not overcompensate a

plaintiff." *See Commercial Union Assur. Co.*, 17 F.3d at 613 (citation omitted); *see also Clarke v. Frank*, No. 88 CV 1900(JLC), 1991 WL 99211 (E.D.N.Y. May 17, 1991) (plaintiff not entitled to prejudgment interest award which results in "windfall"). Last but not least, as the parties agree, plaintiffs have the burden of proving the scope and extent of such relief. *See* U.S. Resp. at 22; and St. Post-Tr. Memo. at 62. They have not met that burden in terms of showing their entitlement to the approximately $1.7 billion figure which the Cayuga's expert recommends.

Having eliminated the analyses of Drs. Temin and Grossman, and Mr. Dorchester, the court is left with Dr. Berkman's analysis. As did Dr. Berkman (and Temin), the court will use compound interest. Compounding furthers the primary goal of prejudgment interest, which is to make the plaintiff whole again; and the economists uniformly testified, compounding is the norm from a strictly economic perspective. As previously alluded to, application of simple interest here would result in an award which would be too low, and thus would not comport with notions of fairness given the fact that the Cayuga have been deprived of the use and enjoyment of their former homelands for over 200 years.

"In a fluctuating economy, a fixed interest rate cannot respond to changes in conditions, frequently resulting in inadequate compensation." *Survey*, 77 Nw. U.L.Rev. at 194. "The rate of prejudgment interest should be a flexible one which is responsive to changing economic conditions." *Id.* at 222. The rates provided by Dr. Berkman easily meet that criteria. "[F]or most of this century," he used "the 3-month Treasury Bill" rate; "[d]uring the 1800's," he used "various municipal, state,

and federal bonds[;]" and between 1795 and 1797, he used the rate "associated with a loan from Holland to the American Revolutionary government." *See* Gov. exh. 2, at § IV, ¶ (D). Close examination of these rates reveals that Dr. Berkman did take into account changing economic conditions through the use of those fluctuating rates. Use of these historic, changing interest rates also properly takes into account the fact that "[a]s recent developments in the national economy so readily reveal, the earning power on investments varies a great deal over time." *Survey*, 77 N.W. U.L.Rev. at *220 (footnote omitted). Taking into account what is equitable and necessary to compensate the Cayuga in this unique case, the court finds that the rates used by Dr. Berkman best comport with the full compensation purpose of a prejudgment interest award. *See Jones v. UNUM Life Ins. Co. of America*, 223 F.3d 130, 139 (2d Cir.2000) (citations omitted) ("[T]he same considerations that inform the court's decision whether or not to award interest at all should inform the court's choice of interest rate[.]").

In *Cayuga VIII*, 1999 WL 224615, the court identified the accrual date, the interest rate and the methodology as three issues which it must "carefully . . . consider[ ]" in awarding prejudgment interest. *See id.* at *21. As should be readily apparent by now, the only remaining prejudgment interest issue is probably the most heavily disputed-the accrual date. Because of the time span involved, what might seem like a rather mundane issue has taken on much greater significance. A number of different possible dates have been suggested both by the court, *see Cayuga VIII*, 1999 WL 224615, at *23, and the parties. *See* St. exh. 698 at 6, ¶ 4(a); and St. exh. 721 at 12, ¶ 34. The first and most

obvious accrual date is the "date of injury or deprivation," or July 27, 1795, the date of the first transaction. *See id.* (citations omitted). As several of the experts' calculations of prejudgment interest show, however, especially those of Dr. Temin, using that 1795 accrual date and compounding interest has the potential for rendering an enormous amount of prejudgment interest in this case.

Nonetheless, the court adopts July 27, 1795, as the accrual date. Even a cursory review of the experts' calculations using accrual dates from more recent years, such as 1980 when this action was first commenced, or 1992 when the U.S. intervened, reveals that an award based on those dates would be relatively insignificant and could in no way fully compensate the Cayuga. It would be fundamentally unfair to rely upon such accrual dates in the context of this unique litigation.

From the time it first became evident that a second phase of this litigation would be required, it has always been known that equities would dominate, and so they have. When confronted with the fact that the Cayuga were seeking ejectment as a remedy, this court stated that "the time ha[d] finally come to invoke . . . equitable principles[.]" *See Cayuga X*, 1999 WL 509442, at *22. The court further remarked that such principles "were no longer an abstract concept, but a reality which the Cayuga[], as well as the defendants must face[.]" *Id.* The same is true again today. Using July 27, 1795, as the accrual date and compounding, even with the most conservative interest rates, still results in an immense sum, as is evidenced by Dr. Berkman's conclusion that the Cayuga are entitled to $529,377,082.00 in prejudgment interest. Therefore, in balancing all of the equities and "adopting a flexible and commonsense ap-

proach," *see Cayuga VIII*, 1999 WL 224615, at *22 (internal quotation marks omitted), the court has determined that it is necessary to adjust that amount. There are a host of reasons compelling such an adjustment.

Even though the court is not relying upon Dr. Grossman's calculations of prejudgment interest, it does give some credence to a few other points which he made. In disputing the methodology applied by Drs. Temin and Berkman, Grossman challenges several aspects of same. Grossman challenges their failure to take into account what the Cayuga would have done with the money if they had actually received adequate consideration in 1795. He also asserts that there are too many unknowns, such as whether the Cayuga would have had access to financial markets and whether or not they had the ability, knowledge, or skills to take advantage of such markets, especially in the early years. Grossman also points out that Temin and Berkman did not take into account expenses which would have been necessarily incurred if the Cayuga had remained in possession of the subject property for the past 204 years, such as their ability to collect rents, overhead costs, taxation, etc.

According to Grossman, another weakness in the methodology used by Temin and Berkman is that they did not consider the fact that the claim area, as unimproved, had no rental value until the twentieth century. Grossman also takes Temin and Berkman to task for compounding interest over 204 years, which Grossman deemed a theoretical exercise because it ignores such factors as times when this country's banks were in crisis and many investors lost significant sums of money. Grossman also noted that compounding interest over a long period of time is unlikely to occur in a real world

market. Although the court is not persuaded to alter its view that overall Dr. Berkman's basic approach is the one which it will adopt in determining the amount of prejudgment interest to be awarded in this case, Dr. Grossman made some valid points which the court will consider in evaluating the relative equities herein.

In addition to what the court will loosely refer to as these "economic" reasons which factor into its decision to adjust Dr. Berkman's prejudgment interest determination, there are other reasons as well. A recent Supreme Court decision supports this court's view that the amount of prejudgment interest awarded herein should be adjusted due to the long passage of time. In *Kansas v. Colorado*, 533 U.S. 1, 121 S. Ct. 2023, 150 L.Ed.2d 72, a case between two states involving violations of a water rights compact, the Supreme Court recently held that a Special Master properly balanced the equities in making a prejudgment interest award, and concluded that the accrual date should be 1985, the filing date of the complaint, rather than 1969 when Colorado knew or first should have known it was violating that compact. *See id.* at 2030-32. Adopting the Special Master's reasoning, the Supreme Court affirmed because, a "long interval [had] passed between the original injuries and th[o]se proceedings[,]" and during the early years of the compact, "no one had any thought that [it] [had been] violated." *Id.* at 2031. "[T]he dramatic impact of compounding interest over many years[]" was also deemed adequate justification for choosing a later accrual date. *Id.* at 2031 (citation omitted).

That reasoning applies with equal if not more force here. In *Kansas*, the "long interval" was "at least 50 years." *Kansas v. Colorado*, Third Report of Special

Master (August 200) at 99. Here, the "long interval" is four times that-over 200 years. Likewise, in the present case, even assuming *arguendo* that the State had notice of a Nonintercourse Act violation on July 27, 1795, surely it did not have notice that its liability for that violation could include compounded prejudgment interest, much less in the amounts suggested by the expert economists today. This court too cannot ignore the "dramatic impact" of compounding interest in this case. Allowing recovery for 200 years of compounded prejudgment interest would offend this court's sense of fundamental fairness. All these factors militate in favor of reducing Dr. Berkman's suggested prejudgment interest amount of $527,500,817.00.

The court would be remiss if, in its discussion of fairness and relative equities, it did not mention the conduct of the U.S. toward the Cayuga. The U.S. has actively and effectively represented the Cayuga's interest in this litigation since 1992 when it was granted intervener status. The court cannot turn a blind eye, however, to the U.S.' behavior toward the Cayuga in the years, indeed, centuries prior to its intervention. Despite its fiduciary role under the Nonintercourse Act, *see Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975), before it intervened in this action the U.S. had not been as solicitous and supportive, nor so active in protecting the Cayuga's interests, as it has been in the 11 years since its intervention.

The record in this case touches upon the U.S.' inaction. Suffice it to say that the U.S., like the State, has at times advanced certain policies and legislation strictly for its own benefit without taking into account competing interests of Indians such as the Cayuga. In

fact there is evidence in the record that prior to this litigation the U.S. had taken positions which are contrary to those of the Cayuga's interests herein by in essence in aligning itself with the State and the positions it has taken in the current litigation. During the course of the American and British Claims Arbitration, for example, the U.S. took the position that the State did not need federal approval in entering into treaties with the Cayuga, and the positions it has taken in the current litigation; thus, by implication the 1795 and 1807 Treaties were valid. Of course, the U.S. has taken the exact opposite position throughout this litigation. In this court's more than 20 years of experience in land claim litigation such as this, it has too often been the case that the Indians have been pawns between the State and federal government. Unfortunately, this case is no different.

The court further observes that the sole basis for its earlier holding that neither the 1795 nor the 1807 Treaties were carried out in conformity with the Nonintercourse Act is the fact that the federal government never expressly ratified either of those Treaties. *See Cayuga IV*, 730 F. Supp. at 489. In the eight months between the execution and ratification of that Treaty, the federal government failed to inform the State that that Treaty did not comply with the Nonintercourse Act. Nor has the U.S. ever ratified this Treaty, which obviously has the very real potential for rendering this litigation moot. It is patently obvious that had the U.S. carried out its fiduciary responsibilities to act on behalf of its ward, the Cayuga Native Americans, this court would not have been faced with the herculean task of righting the wrong which was perpetrated on the Cayuga centuries ago. In that regard, the State should

not have to shoulder the blame for the U.S.' wrongful conduct in addition to its own, and the court will take that equitable fact into consideration in arriving at its ultimate award to the Cayuga.

Conclusion

In conclusion, the court has determined that although acceptance of plaintiffs' experts' analysis and conclusions cannot be faulted on purely economic principles and might well be justified in providing for prejudgment interest in the usual case when ascertaining damage over a limited period of years, the unique and unprecedented circumstances of this case, *i.e.*, a period of over two centuries between loss and final judgment, cry out for consideration of other factors here and a common sense view to modify the rigid economic text book approach. Thus, the court will adopt the analysis of Dr. Berkman and his computations as to the ultimate prejudgment interest loss to the Cayuga. The court will, however, discount Dr. Berkman's total to take into account: (1) the passage of 204 years; (2) the failure of the U.S. to intervene or to seek to protect the Cayuga's interests prior to 1992; (3) the lack of fraudulent or calculated purposeful intent on the part of the State to deprive the Cayuga of fair compensation for the lands ceded by them in the 1795 and 1807 Treaties; and (4) the financial factors enumerated by Dr. Grossman.

After having given careful consideration to the evidence presented to the court in the form of historical, economic, financial, and real estate proof, the court, in its discretion, finds it just and equitable to award 40% of the $527,500,817.00 computed damages arrived at by Dr. Berkman, in the amount of $211,000,326.80. When that sum is added to the jury award of $1,911,672.62 for the fair rental value of the claim area less credits to the

State, and the jury award of $35,000,000.00 for the future loss of use and possession of the claim area, both of which concerned the Cayuga land as unimproved but with infrastructure in place, the Cayuga will at last receive just and fair compensation for the loss of use of that land, past and future.

Accordingly, the court finds that the Cayuga are entitled to an award here of $1,911,672.62 for the fair rental value of the claim area from July 27, 1795 to February 17, 2000, and $35,000,000.00 for the future loss of use and possession of the claim area, as found by the jury on February 17, 2000, and to a further award of $211,000,326.80 for prejudgment interest in connection with the reasonable rental award against the State making a total award of $247,911,999.42, and the Clerk of the Court shall forthwith enter judgment in accordance herewith.

IT IS SO ORDERED.

05-978 FEB 3 - 2006

No. OFFICE OF THE CLERK

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE E. PATAKI, GOVERNOR OF THE STATE OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

VOLUME 2

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TABLE OF CONTENTS

Page

Volume 1

Appendix A (Court of appeals opinion, dated June 28, 2005) 1a

Appendix B (District court order, dated June 17, 2002) 51a

Appendix C (Second amended judgment in a civil case, dated June 17, 2002) 54a

Appendix D (Memorandum-decision and order, dated Mar. 11, 2002) 58a

Appendix E (Memorandum-decision and order, dated Oct. 2, 2001) 120a

Volume 2

Appendix F (Memorandum-decision and order, dated July 1, 1999) 322a

Appendix G (Memorandum-decision and order, dated Aug. 13, 1991) 388a

Appendix H (Memorandum-decision and order, dated Mar. 6, 1991) 400a

Appendix I (Memorandum-decision and order, dated Feb. 15, 1990) 423a

Appendix J (Memorandum-decision and order, dated Aug. 21, 1987) 443a

Appendix K (Memorandum-decision and order, dated May 26, 1983) 466a

Appendix L (Order denying petition for rehearing, dated Sept. 8, 2005) 537a

Appendix M (Order denying petition for rehearing, dated Sept. 8, 2005) 539a

Appendix N (Statutory provisions) 541a

APPENDIX F

UNITED STATES DISTRICT COURT
N.D. NEW YORK.

NOS. 80-CV-930, 80-CV-960.

THE CAYUGA INDIAN NATION OF NEW YORK, ET AL.,
PLAINTIFFS

AND

THE SENECA-CAYUGA TRIBE OF OKLAHOMA,
PLAINTIFF-INTERVENOR

v.

MARIO M. CUOMO, ET AL., DEFENDANTS

July 1, 1999

MEMORANDUM-DECISION & ORDER

MCCURN, Senior J.

Introduction

Anticipating the damage phase of this litigation, which is now scheduled to commence on September 8, 1999, the defendants made a number of motions *in limine* seeking to limit the remedies available to plaintiffs, the Cayuga Indian Nation of New York ("the Nation") and the Seneca Cayuga Tribe of Oklahoma

("the Tribe").[1] The court has now resolved nearly every aspect of these extensive motions. The remaining issue, however, easily is the most volatile: whether the remedy of ejectment is available to the Cayugas who have already succeeded in the liability phase of this lawsuit.

After hearing the parties' legal arguments regarding ejectment, the court decided that that issue could not be resolved in a factual vacuum. Therefore, the court conducted an evidentiary hearing on September 16, 17, and 18, 1998. During the course of that hearing the court heard the testimony of seven witnesses and received into evidence a number of exhibits. Following that hearing, the parties were directed to file post-hearing memoranda, the last of which was filed on January 22, 1999 (although on February 10, 1999, the State did submit a letter bearing on the Eleventh Amendment immunity issue).

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[1] To simplify matters, as it has previously, the court will continue to collectively refer to the Nation, the Tribe, and the United States of America as "the Cayugas," "except when it is necessary to distinguish between them as separate entities." *Cayuga Indian Nation of New York* v. *Pataki*, Nos. 80-CV-930; 80-CV-960, 1999 WL 224615, at *25 n. 2 (N.D.N.Y. April 15, 1999) ("Cayuga VIII"). Again, "[a]t a few points herein, 'the Cayugas' will refer only to the Nation and the Tribe, but that will be obvious from the context." *Id.* Similarly, unless necessary to distinguish among them, the various State officials and State agencies will be collectively referred to throughout as "the State," even though the State itself is not named as a defendant in either the Nation's Complaint ("Nation Co.") or the Tribe's Amended Complaint in Intervention ("Tribe Co.").

In another effort to simplify matters, even though the Nation and the Tribe filed separate complaints, except where it is necessary to refer to those complaints individually, they will be collectively referred to in the singular as the "Cayuga complaint."

On June 4, 1999, the court orally granted the defense motion seeking to bar ejectment as a remedy, indicating that its reasons for so doing would be forthcoming shortly. Following constitutes the court's decision in this regard.

Discussion

I. Scope of Record

The Cayugas object to two separate aspects of the Defendants' Joint Post-Trial Brief ("Def. Memo."). First, they argue that the defendants have impermissibly expanded the scope of the record by referring to the affirmation of Assistant Attorney General David B. Roberts, as well as the affidavit of defendant Miller Brewing Company's ("Miller") expert, Francis G. Hutchins, Ph.D. The Cayugas contend that during the hearing the court excluded such evidence. Based upon that assumption, the Cayugas did not rely upon what they term "excluded testimony," such as the affidavit of their "expert" Elizabeth Tooker. *See* Letter from Raymond J. Heslin to Court of 12/7/98 ("Heslin Ltr") at 2. In light of the foregoing, the Cayugas argue that it would be "manifestly unfair" for the court to now consider the Roberts affirmation and the Hutchins affidavit. *Id.* Therefore, the Cayugas are requesting that the court strike from defendants' post-hearing memorandum all references to these two documents. At a minimum, the Cayugas contend that the court should "ignore" this allegedly improper factual material. *Id.*

In the State's opinion, the court "deferred" ruling on the admissibility of the Roberts affirmation and the Hutchins affidavit "until it had reviewed the material submitted at the hearing." Letter from David B. Roberts to Court of 12/9/98 ("St.Ltr") at 1. Based upon

that understanding, the State notes that it cited to Roberts' affirmation only after renewing its request that the court consider this evidence. In renewing that request, the State stresses that the court should consider the "historical evidence summarized in the Roberts affirmation" because the court allowed into evidence the Cayugas' historical proof. *Id.* Evidently the State is referring to the four exhibits attached to the December 15, 1989, declaration of attorney Glenn M. Feldman. From the court's perspective, those documents from 1795 and 1796 are germane to the issue of what did the State of New York know and when did it know it, in terms of the ramifications of entering into treaties with various Indians within the State without the authority of the United States.

As to the Hutchins affidavit, the State points out that the Cayugas are completely disregarding the context in which it is referring to that document. If, as the State believes, the court reserved decision on the admissibility of the affidavit of the Cayugas' "expert," Tooker, then the State is requesting that the affidavit of Miller's expert, Hutchins, be considered, but only if the court considers the Tooker affidavit.

Defendants Seneca and Cayuga Counties ("the Counties") also object to the Cayugas' "unilateral" attempt to expand the record; but their concern is a November 10, 1998 article from *The Post Standard*, which the Cayugas include in their post-hearing submissions. *See* Letter from William L. Dorr to Court of 12/9/98 at 2. According to the Counties, the court should not consider that newspaper article because it was not part of the record and it is not accurate.

A. Roberts Affirmation

To counterbalance the historical proof upon which the Cayugas rely (and hence to give a broader historical backdrop), the court will consider that aspect of the Roberts affirmation addressing the issue of whether the Cayugas delayed in bringing this lawsuit. In all other respects, however, the court will not consider that affirmation.

B. Hutchins and Tooker Affidavits

The State is correct that the court reserved decision on the admission of the Tooker and Hutchins affidavits. See Transcript (Sept. 16, 1998) ("Tr.I") at 186. After reviewing the record as a whole, the court has decided that it will not consider either of these affidavits because the record is sufficiently complete on the matters contained therein. Moreover, because those affidavits basically contradict each other and because the court did not have the opportunity to hear cross-examination of either individual, the opinions contained therein are not particularly helpful.[2]

C. November 1998 Newspaper Article

Indisputably, the article from *The Post Standard* was not part of the record. Therefore, the court declines to consider the same, and thus there is no need to determine the accuracy of any statements contained therein.

II. Scope of Legal Arguments

In addition to challenging the scope of the record, a dispute has arisen as to the permissible scope of the legal arguments. Both the Cayugas and the Counties

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[2] The court is well aware of the possibility that its own pre-hearing limitation as to the number of witnesses prevented the live testimony of Hutchins and Tooker, as well as perhaps others.

contend that there are certain arguments in the parties' submissions to the court which should be disregarded because those issues have previously been decided. The Cayugas contend that the State has impermissibly expanded the scope of its legal arguments by again addressing the issues of burden of proof and Eleventh Amendment immunity. Thus, as with the allegedly extraneous factual references, the Cayugas are requesting that the court strike or at least "ignore" those two sections of defendants' post-hearing memorandum. Heslin Ltr at 2.

The State, in response, justifies raising the burden of proof issue in the context of ejectment so that it can "expressly address" the Supreme Court's decision in *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 99 S. Ct. 2529, 61 L.Ed.2d 153 (1979), "vis-a-vis a State." St. Ltr at 2. The State further asserts that renewal of its Eleventh Amendment argument is warranted because there have been changes in "legal and factual circumstances[,]" requiring the court to revisit this issue. *Id.*

By the same token, the Counties contend that it is the Cayugas who are improperly seeking reconsideration of an issue which has been decided already-the issue of the analytical framework for the ejectment issue. In particular, the Counties point to the fact that in anticipation of the ejectment hearing this court directed the parties to file a stipulation of agreed facts based upon the equitable factors enumerated in *United States* v. *Imperial Irrigation District*, 799 F.Supp. 1052 (S.D. Cal. 1992). See *Cayuga Indian Nation* v. *Cuomo*, Nos. 80-CV-930, 80-CV-960, 1998 WL 460241, at *1 (N.D.N.Y. Aug. 6, 1998). In light of that explicit order, the Counties object to the Cayugas' renewed argument that the factors set forth in Imperial Irrigation should

not be considered in this case. The court will separately address whether it will revisit the burden of proof issue, the State's Eleventh Amendment argument and the propriety of the Imperial Irrigation analysis.

A. Burden of Proof

Turning first to the burden of proof, given the court's recent decision wherein it addressed that issue at some length, including the import of the Supreme Court's decision in *Wilson*, there is no need to discuss the burden of proof issue any further. *See Cayuga VIII*, 1999 WL 224615, at *2-*5. The court will stand by its prior ruling on that issue. On the other hand, as the court indicated in Cayuga VIII, for the reasons set forth below, it will revisit the Eleventh Amendment immunity issue. *Id.* at *19. Finally, although the court continues to adhere to its prior ruling that it will analyze the availability of ejectment as a remedy employing the factors enumerated in Imperial Irrigation, because it has not previously fully stated its reasons for so holding, it will do so below.

B. Eleventh Amendment Immunity

1. Background

Before deciding whether it is appropriate for the court to reconsider the impact of the Eleventh Amendment on this case, a recitation of the history of that issue in the context of this litigation is warranted. In their complaint the Cayugas name as defendants, among others, various State agencies and individual agency heads, including the Governor, but not the State itself. Although not explicitly stated in their complaint, the Cayugas have made clear that that they are suing the individual State defendants in their "official capacity as agents [of the State]." Transcript (Oct. 15, 1991)

("Tr.10/15/91") at 20 and 22. On the theory that those individuals are holding the subject property in violation of the *Nonintercourse Act*, 25 U.S.C. § 177, and the United States Constitution, the Cayugas also have expressly stated that they are seeking ejectment as a remedy against the individual State defendants; but the Cayugas are not seeking monetary damages against them. *Id.* at 21. Somewhat surprisingly, the State did not assert Eleventh Amendment immunity in its answers to either the Nation's complaint or the Tribe's complaint.

In terms of the State defendants, the United States' complaint differs somewhat from that of the Cayuga complaint. In the caption of its complaint, the United States specifically names as a defendant Mario M. Cuomo, who was then Governor of the State of New York. Beyond that, in terms of identifying defendants, the United States makes only the broad allegation that "[t]he defendants are all persons, corporations, or governmental entities with a legal or equitable interest in the [subject] property[.]" United States Complaint in Intervention ("U.S.Co.") at 3, ¶ 5. Presumably this broad language includes the State agencies and individual State officials identified in the Cayuga complaint. Furthermore, also based upon this broad allegation, the court views the United States as asserting claims against the State itself even though the State itself is not expressly named as a defendant in the United States' complaint.

After a relatively prolonged period of motion practice, on August 13, 1991, this court granted the Cayugas' motion for partial summary judgment on the issue of liability "as to all defendants except the State of New York." *Cayuga Indian Nation of New York* v.

Cuomo, 771 F. Supp. 19, 24 (N.D.N.Y.1991) ("Cayuga VI"). The State was excepted from that ruling because during oral argument it first raised the possibility of Eleventh Amendment immunity in light of the Supreme Court's then fairly recent decision in *Blatchford* v. *Native Village of Noatak and Circle Village*, 501 U.S. 775, 111 S. Ct. 2578, 115 L.Ed.2d 686 (1991). Tr. 10/15/91 at 21 n. 2.

The Eleventh Amendment provides that "[t]he Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Despite that straightforward language, the Eleventh Amendment "has consistently been interpreted to mean that a state, as a sovereign entity within our constitutional system, may not be sued by an individual whether a citizen of that state, another state or a foreign country-in federal court without its consent." *U.S.* v. *State of Vt. Agency of Natural Resources*, 162 F.3d 195, 209 (2d Cir. 1998) (Weinstein, J., dissenting on other grounds) (and cases cited therein), petition for cert. filed, 527 U.S. 1034, 119 S. Ct. 2391, 144 L.Ed.2d 792, 67 U.S.L.W. 3717 (U.S. May 12, 1999) (No. 98-1828). Further extending the foregoing, the Blatchford Court held that the Eleventh Amendment barred an action against a state official by several Alaska native villages challenging the implementation of a state revenue-sharing statute, where the state had not consented to such a suit. The Court further held that 28 U.S.C. § 1362, the general jurisdictional statute pertaining to actions brought by Indians, did not operate to void this Eleventh Amendment immunity.

Given that Blatchford was decided on June 24, 1991, obviously the parties had not had an opportunity to fully consider its impact on the present case when they were before the court a couple of weeks later on July 12, 1991. Therefore, the court expressly "invited the State to bring a formal motion concerning the issue of sovereign immunity[,]" giving all parties an opportunity to address Blatchford. *Cayuga VI*, 771 F. Supp. at 21 n. 2. Responding to that invitation, a few months later the State's Eleventh Amendment argument, among others, was squarely before the court. Following October, 1991, oral argument the court reserved decision. Approximately two years later, in September, 1993, pending settlement negotiations, the State withdrew its motion to dismiss on Eleventh Amendment grounds. In the meantime, on November 30, 1992, the court granted the United States' motion to intervene as a plaintiff in this action.

Around this same time, a case arose in Idaho District Court which would eventually have some bearing on the present case. The Couer d'Alene Indian Tribe ("the Tribe") sued the State of Idaho, as well as several state officials (in their individual and official capacities) and state agencies, alleging ownership of the "beds and banks of all navigable watercourses and waters . . . within the original boundaries of the Couer d'Alene Reservation, as defined by . . . Executive Order[,]" which was ratified by a federal statute. *Idaho* v. *Couer d'Alene*, 521 U.S. 261, ___, 117 S. Ct. 2028, 2032, 138 L.Ed.2d 438 (1997) ("*Couer d'Alene III*"). In addition to seeking title to those submerged lands, the Tribe sought declaratory and injunctive relief to, inter alia, "establish its entitlement to the exclusive use and

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occupancy and the right to quiet enjoyment of the submerged lands[.]" *Id.*

The Ninth Circuit held "that the Eleventh Amendment bar[red] all claims against the State and the Agencies[,]" but the *Ex parte Young* doctrine[3] applied so that the Tribe could proceed with its claims for declaratory and injunctive relief against the individual State officials. *Couer d'Alene Tribe of Idaho* v. *State of Idaho*, 42 F.3d 1244, 1247; and 1250-54 (9 th Cir. 1994) ("*Couer d'Alene II*"). Reasoning that because the Tribe's action was not one against the State in that the Couer d'Alene Tribe had alleged that the State officials violated a federal statute, the Ninth Circuit held that the Eleventh Amendment did not bar those claims. *Id.* at 1251 (citing *Ex parte Young*, 209 U.S. at 159-60, 28 S. Ct. at 453-54).

After prolonged but eventually fruitless settlement negotiations in the present case, in March, 1996, the State renewed its motion to dismiss the Cayuga complaint for lack of subject matter jurisdiction, asserting Eleventh Amendment immunity. Immediately following the July 10, 1996, argument, the court granted that motion insofar as the State agencies were con-

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[3] "In *Young*, the Court held that a federal court has jurisdiction over a suit against a state officer to enjoin official actions that violate federal law, even if the State itself is immune from suit under the Eleventh Amendment. The *Young* doctrine recognizes that if a state official violates federal law, he is stripped of his official or representative character and may be personally liable for his conduct; the State cannot cloak the officer in its sovereign immunity." *Couer d'Alene III*, 521 U.S. at ___, 117 S. Ct. at 2043 (O'Connor, J.) (Concurring in part and concurring in the judgment) (citing *Ex parte Young*, 209 U.S. 123, 159-60, 28 S. Ct. 441, 454, 52 L.Ed. 714 (1908)).

cerned, but it denied that motion "as [to] the individual state defendants . . . , primarily for the reasons set forth by the Ninth Circuit in *Couer d'Alene [III]*. . . , cert. granted, 116 S. Ct. 1415 (1996)." Order (July 21, 1996) at 1-2 (citation omitted). In other words, after *Couer d'Alene II*, as to the Cayugas' claims, the only remaining defendants are the individual State officials, to the extent that the Cayugas are seeking declaratory and injunctive relief against those officials to preclude future violations of federal law. However, because the State's July, 1996 motion to dismiss pertained only to the Cayugas, the United States' complaint was not implicated by that motion. Hence, the State, its agencies and the individual State officials are all still defendants in connection with the claims asserted therein.

Almost one year after that July, 1996 order, in a fractured 5-4 decision,[4] the Supreme Court reversed *Couer d'Alene II*. Viewing "the Tribe's suit [as] the functional equivalent of a quiet title action which implicates special sovereignty interests[,]" in the principal opinion the Court held that the Tribe could not invoke the fiction of *Ex parte Young* to hail the state officials into federal court. *Couer d'Alene III*, 521 U.S. at ___, 117 S. Ct. at 2043. The Court explained: "[I]f the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. Under these *particular and special circumstances*, we find the *Young* exception inapplicable. The dignity and status of its statehood

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[4] Five Justices agreed that the Tribe could not sue the state officials in federal court, but a majority could not agree on the rationale for this holding.

allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case." *Id.* at ___, 117 S. Ct. at 2042 (emphasis added). The end result of these two *Couer d'Alene* decisions was to altogether deny the Tribe itself a federal forum for the vindication of its federal rights.

2. Reconsideration

Both the State and the Cayugas are asking this court to reconsider its prior rulings with respect to the Eleventh Amendment, but for different reasons. The State contends that *Couer d'Alene III* represents a "change in the controlling law" mandating reconsideration, and indeed, reversal of this court's July, 1996, order as it pertains to the individual State defendants. Def. Memo. at 68 and 70. The State maintains that the Eleventh Amendment not only bars the Cayugas' claims against the State agencies, but that after *Couer d'Alene III* that Amendment also bars the Cayugas' claims against the individual State defendants. Further, argues the State, the fact that the United States is now a plaintiff in this action does not defeat the State's Eleventh Amendment immunity in any way because (1) the United States intervened in this lawsuit a number of years after its commencement; and (2) the United States did not initiate this lawsuit; the Cayugas did. Moreover, from the State's perspective, the Cayugas and the United States are asserting very different claims and legal positions-another factor which the State believes militates in favor of a finding of Eleventh Amendment immunity. For these reasons, the State defendants are seeking dismissal in "the entirety" of the Cayugas' claims against them. *Id.* at 77.

Couer d'Alene III does not represent a change in controlling law respond the Cayugas. In fact that case is "wholly irrelevant" to the Eleventh Amendment issue before this court because in contrast to *Couer d'Alene III*, the United States is a plaintiff in this action. Memorandum in Opposition to the Dismissal of Defendant State Officials Based on Eleventh Amendment Immunity ("Pl. Opp'n Memo.") at 16. Regardless of *Couer d'Alene III*, on the basis of *Arizona* v. *California*, 460 U.S. 605, 103 S. Ct. 1382, 75 L.Ed.2d 318 (1983), the Cayugas strongly urge this court to reconsider its prior ruling wherein it granted the State agencies' motion to dismiss based upon the Eleventh Amendment.[5] Succinctly put, based upon *Arizona* the Cayugas argue that the Eleventh Amendment does not defeat its claims against the State agencies because the United States is a plaintiff-intervenor in this action, asserting "the same claims" as the Cayugas; and it matters not whether the Cayugas or the United States initiated this litigation. *Id.* at 9. Therefore, the Cayugas are requesting reconsideration of the court's earlier decision dismissing their claims against the State agencies, as well as seeking reinstatement of those claims. Finally, notwithstanding *Couer d'Alene III*, wherein the Supreme Court refused to invoke the fiction of Ex parte Young to allow the Tribe to pursue its claims for declaratory and injunctive relief against the State officials, the Cayugas contend that the *Young*

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[5] In that ruling, the court generically referred to "the State of New York." Order (July 21, 1996) at 1. As previously explained, though, the State itself is not named as a defendant in the Cayugas complaint. Therefore, that ruling could only apply to the State agencies which are specifically enumerated in the Nation's complaint. Allegations as to those agencies are also specifically incorporated by reference in the Tribe's complaint.

doctrine provides a basis, separate and apart from *Arizona*, for allowing the Cayugas to continue with their claims against the individual State officials.

Before addressing these substantive Eleventh Amendment arguments, there are three prefatory issues upon which the court will at least touch. The first is the timeliness of the State's request for reconsideration; the second is the State's failure to allege Eleventh Amendment immunity, either in its answer to the Nation's complaint or in its answer to the Tribe's complaint. Third, because the parties have raised it, the court will briefly address whether these requests for reconsideration implicate the law of the case doctrine.

a. Timeliness

i. State

As previously mentioned, the sole basis for the State's request for reconsideration of the Eleventh Amendment issue is *Couer d'Alene III*, which the Supreme Court decided on June 23, 1997. Given that in this case there was no stay in place at that time or thereafter, certainly the State could have renewed this Eleventh Amendment argument much sooner; but it did not. Instead, in conjunction with this motion challenging the availability of ejectment as a remedy, the State waited until November 30, 1998, to renew this argument.

Rule 12(h)(3) states that "[w]henever it appears . . . that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. *Fed. R. Civ. P. 12(h)(3)* (emphasis added). Apparently this Rule is the basis for the State's reconsideration request. Underlying the State's reconsideration request is the

assumption that the Eleventh Amendment relates to subject matter jurisdiction, and as such the court may consider this argument at any time. Assuming, as does the State, that "the Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power, and therefore can be raised at any stage of the proceedings," *Calderon* v. *Ashmus*, 523 U.S. 740, —— n. 2, 118 S. Ct. 1694, 1697 n. 2, 140 L.Ed.2d 970 (1998),[6] the fact that the State did not renew this argument earlier does not preclude the court from considering the same even at this advanced stage of the litigation. *Cf. S. Jackson & Son* v. *Coffee, Sugar and Cocoa Exchange*, 24 F.3d 427, 430 (2d Cir. 1994) (citation and internal quotation marks omitted) ("It is axiomatic that in our federal system of limited

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[6] There are competing theories as to the nature of the Eleventh Amendment; that is whether it is a limitation on a court's subject matter jurisdiction under Article III or whether it is a grant of immunity (i.e., a type of defense). See *Parella* v. *Retirement Board of the Rhode Island Employees' Retirement System*, 173 F.3d 46, 54 (1 st Cir. 1999) (citing, inter alia, Chemerinsky, Federal Jurisdiction § 7.3 (2d ed.1994)). *Cf. Wisconsin Dep't of Corrections* v. *Schact*, 524 U.S. 381, __, 118 S. Ct. 2047, 2054, 141 L.Ed.2d 364 (1998) (noting that whether the Eleventh Amendment is a matter of subject matter jurisdiction is a question not yet decided by the Supreme Court). The Second Circuit has explicitly stated, however, that the Eleventh Amendment "affects . . . subject matter jurisdiction." *Atlantic Healthcare Benefits Trust* v. *Googins*, 2 F.3d 1, 4 (2d Cir.1993) (citations omitted). The Second Circuit has continued to maintain this view. Albeit inferentially, as recently as February 24, 1999, it affirmed a district court's denial of the State's motion to dismiss for lack of subject matter jurisdiction based upon the Eleventh Amendment. See *Anderson* v. *State University of New York*, 169 F.3d 117 (2d Cir.1999), petition for cert. filed (May 17, 1999) (No. 98-1845). Accordingly, in accordance with Second Circuit precedent, for now this court too will treat the Eleventh Amendment as jurisdictional in nature.

jurisdiction any party or the court sua sponte, at any stage of the proceedings, may raise the question of whether the court has subject matter jurisdiction.").

Moreover, as will soon be evident, there is no prejudice to the Cayugas in treating the Eleventh Amendment as a jurisdictional bar which may be raised at any time. Indeed, although the Cayugas challenge the State's Eleventh Amendment immunity on several grounds, timeliness is not one of them. What is more, given that the Cayugas based their request for reconsideration upon a 1983 Supreme Court decision, they have been even more lax than the State in terms of the timeliness of their own request for reconsideration. Certainly it would have been preferable for the State to have earlier raised its Eleventh Amendment argument based upon *Couer d'Alene III*. Nonetheless, the court will consider this argument now because: (1) arguably the Eleventh Amendment goes to the core of this court's subject matter jurisdiction, and as such is an issue which may be raised at any time; and (2) reconsideration of this issue does not prejudice the Cayugas.

ii. Cayugas

It is also curious why the Cayugas did not move for reconsideration sooner, given that the basis for their argument is the Supreme Court's 1983 decision in *Arizona* v. *California*. What is more curious, though, is why the Cayugas did not even mention Arizona in opposing the State's 1996 motion to dismiss based upon the Eleventh Amendment. Given the Cayugas' silence at that time, the court presumed that they had simply taken the tack that the United States could adequately represent their interests, and that the Cayugas were

content to pursue their claims against the individual State officials only.

Unlike the State, the Cayugas do not identify any specific procedural rule which might form the basis for their request for "reinstatement" of their claims against the State. See Pl. Opp'n Memo. at 20. Presumably they are relying upon the court's plenary power to reconsider at any time prior to final judgment an interocutory order, such as the court's July, 1996 order pertaining to Eleventh Amendment immunity. See *Kliszak* v. *Pyramid Management Group, Inc.*, No. 96-CV-0041E, 1998 WL 268839, at *1 (W.D.N.Y. April 30, 1998) (citing, inter alia, *Partmar Corp.* v. *Paramount Corp.*, 347 U.S. 89, 100, 74 S. Ct. 414, 98 L.Ed. 532 (1954)); see also Fed. R. Civ. P. 54(b) (emphasis added) (interlocutory orders are "subject to revision at any time before the entry of judgment. . . ."). "[D]istrict courts have broad discretion to revise interlocutory orders as justice so requires[.]" *Id.* "'[T]he major grounds for justifying reconsideration are 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." '*Virgin Atlantic Airways* v. *Nat. Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir.1992) (quoting 18 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice & Procedure § 4478). As will be more fully explained below, in light of Arizona and the Second Circuit's recent affirmance of *Seneca Nation of Indians* v. *State of N.Y.*, 26 F.Supp.2d 555 (W.D.N.Y.1998) ("Seneca Nation I"), aff'd, Nos. 99-6003, 99-6005, 1999 WL 308522 (2d Cir. May 17, 1999) ("Seneca Nation II"), there is a need to "correct a clear error," making reconsideration appropriate even at this late date. Thus, because a final judgment has not been

entered in this case, the court will reconsider the Cayugas' position with respect to the Eleventh Amendment, even though this argument could easily have been made years ago. See *Maryland Cas. Co.* v. *W.R. Grace & Co.*, 23 F.3d 617, 621 (2d Cir. 1993) (because challenges to subject matter jurisdiction "may be raised at any time during the course of litigation[,]" the Court characterized such a challenge as "unexceptional" even though it was renewed "nearly a decade after the litigation began").

b. Failure to Plead

Consistent with the notion that in this case the Eleventh Amendment is a limitation on subject matter jurisdiction, and as such can be raised at any point in the litigation, although the State did not raise the Eleventh Amendment in its answers, its failure to do so does not constitute a waiver. See *Niagara Mohawk Power Corp.* v. *Jones Chemicals, Inc.*, 95-CV-717, 1998 WL 166875, at *1 n. 3 (N.D.N.Y. April 3, 1998) (citation omitted) ("[I]n light of the Supreme Court's decision in *Edelman* v. *Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L.Ed.2d 662 (1974)[,] which allowed Eleventh Amendment immunity to be raised for the first time on appeal, Defendants are not precluded from asserting such a defense notwithstanding [that] they failed to allege it in their answer."); see also *In re Mitchell*, 222 B.R. 877, 885-886 (B.A.P. 9th Cir.1998) (given that Eleventh Amendment immunity may be raised at any time, the state's failure to expressly assert the same in its answer with respect to count one of the complaint did not constitute a waiver of the Eleventh Amendment where the state raised that issue on appeal, and where it had raised the issue of Eleventh Amendment immunity as to two other counts in the complaint);

Sin[illegible]on v. *University of California*, No. C-93-3496, 199[illegible]VL 16978, at *2-*3 (N.D.Cal. Jan. 6, 1995) (because Eleventh Amendment immunity "is not to be lightly inferred," and "the test for finding waiver . . . is a stringent one[,]" the state's failure to raise [such defense] until after the filing of its answer did not amount to a waiver). Here, the State's renewal of its Eleventh Amendment argument can hardly come as a surprise to the Cayugas; indeed they are not claiming any prejudice in relation thereto. This lack of prejudice bolsters a finding of no waiver.

c. Law of the Case

In a rare moment of agreement, both the State and the Cayugas contend that the law of the case doctrine, which posits that "if a court decides a rule of law, that decision should continue to govern in subsequent stages of the same case[,]"[7] does not prevent this court from reconsidering its prior Eleventh Amendment rulings in this case. See Def. Memo. at 70; Pl. Opp'n Memo. at 15. These parties are correct: "[T]he law of the case doctrine is, at best, a discretionary doctrine, which does not constitute a limitation on the court's power but merely expresses a general reluctance, absent good cause, to reopen rulings that the parties have relied upon." *LNC Investments, Inc.* v. *First Fidelity Bank, N.A.*, 173 F.3d 454, 467 n. 12 (2d Cir.1999) (citation and internal quotation marks omitted). In other words, "the law of the case is not a commandment etched in stone." *Mayer* v. *Cornell University, Inc.*, 909 F. Supp. 81, 83 (N.D.N.Y. 1995) (citations and internal quotation marks

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[7] *Doctor's Associates, Inc.* v. *Distajo*, 107 F.3d 126, 131 (2d Cir.) (citations and internal quotation marks omitted), cert. denied, ___ U.S. ___, 118 S. Ct. 365 (1997).

omitted), aff'd on other grounds unpub'd decision, 107 F.3d 3 (2d Cir.), cert. denied, 522 U.S. 818, 118 S. Ct. 68, 139 L.Ed.2d30 (1997). Thus, as this court has previously explained, "when a court is asked to reconsider its own prior rulings, under the more flexible branch of the law of the case doctrine, it may do so when those previous decisions were substantially erroneous or when reconsideration is necessary to avoid injustice." *Id.* at 83 (citation and internal quotation marks omitted). Another compelling circumstance justifying reconsideration, notwithstanding the law of the case doctrine, is an intervening change in controlling law. *Id.* (citation and internal quotation marks omitted)." Consequently, although a court should be loathe to revisit an earlier decision . . . , and although it should exercise its underlying power to reconsider earlier rulings sparingly, . . . , there are certain circumstances where reconsideration is appropriate." *Id.* (citations and internal quotation marks omitted).

Here, there are "certain circumstances" making reconsideration appropriate, and indeed necessary. Arizona and its recent progeny convince this court that its July, 1996 ruling, wherein it found that the Cayugas' claims against the State agencies were barred by the Eleventh Amendment was in error, thus justifying reconsideration of that ruling. On the other hand, as also will be discussed below, despite the State's protestations to the contrary, *Couer d'Alene III* does not mandate reconsideration of this court's prior ruling denying the individual State defendants' motion to dismiss the Cayugas' claims on Eleventh Amendment grounds. Nonetheless, as will be more fully explained below, the court still must reconsider that ruling given its decision today that ejectment is not available as a

remedy. For these reasons, as the parties agree, the law of the case doctrine does not bar reconsideration of the court's prior Eleventh Amendment rulings in this case.

3. Arizona v. California

Although the State is loathe to admit it, the United States' presence as a plaintiff-intervenor significantly changes the complexion of this case in terms of Eleventh Amendment immunity. In *Arizona* v. *California*, a number of entities, including a few states and five Indian Tribes ("the Tribes"), sought to determine their respective rights to the waters of the Colorado River. The United States intervened on behalf of the Tribes, among others. Later the Tribes also sought to intervene. In opposing the Tribes' motion to intervene, the States "insist[ed] that, without their consent, the Tribes' participation violate[d] the Eleventh Amendment." *Arizona*, 460 U.S. at 614, 103 S. Ct. at 1388 (footnote omitted). Swiftly rejecting that argument, the Supreme Court held that allowing the Tribes to intervene did not run afoul of the Eleventh Amendment because "[n]othing in th[at] Amendment 'has ever been seriously supposed to prevent a state's being sued by the United States." *Id.* (quoting *United States* v. *Mississippi*, 380 U.S. 128, 140, 85 S. Ct. 808, 814, 13 L.Ed.2d 717 (1965)) (other citations omitted). In so holding, the Court explained that "[t]he Tribes [were] not seek[ing] to bring new claims or issues against the states, but [were] only ask[ing] leave to participate in an adjudication of their vital water rights that was commenced by the United States." *Id.* Thus the Supreme Court concluded that its "judicial power over the controversy [wa]s not enlarged by granting leave to intervene, and the States' sovereign immunity pro-

tected by the Eleventh Amendment [was] not compromised." *Id.* (citation omitted).

The states in Arizona also opposed the Tribes' intervention on the grounds that the United States could adequately represent the Tribes' interests, and the Tribes could not satisfy the requirements for intervention as a matter of right under Fed. R. Civ. P. 24(a).[8] The Court did not deem the adequate representation argument worthy of comment. As to the intervention as of right argument, however, the Court stated, "it is obvious that the . . . Tribes, at a minimum, satisfy the standards for permissive intervention[.]" Arizona, 460 U.S. at 614-15, 103 S. Ct. at 1388. The Court went on to explain that the Tribes' interests in the Colorado River would be determined in that litigation and the United States, as the Tribes' "representative," would bind the Tribes to any judgment therein. *Id.* at 615, 103 S. Ct. at 1388 (citation omitted). The Court also found that because "the Indians [we]re entitled to take their place as independent qualified members of the modern body politic[,]" their "participation in litigation critical to their welfare should not be discouraged." *Id.* (internal quotations marks, citations and footnote omitted).

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[8] That Rule reads as follows:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a).

Lastly, the Court commented that the States had not made any persuasive showing as to how the Tribes' presence would prejudice the states' interests or unduly delay the litigation. *Id.*

Citing to Arizona, in *Mille Lacs Band of Indians* v. *State of Minn.*, 853 F.Supp. 1118 (D.Minn.1994) ("Mille Lacs I"), the district court dismissed the State of Minnesota's Eleventh Amendment immunity defense where the Chippewa Indians sought to enforce an 1837 treaty which purported to guarantee them certain hunting, fishing and gathering rights. *Id.* at 1129. In Mille Lacs I, as in the present case, the United States was granted leave to intervene as a plaintiff. Adopting the Supreme Court's reasoning in Arizona, the Mille Lac I court declared that because the United States and the Chippewas were "seeking identical relief[,] . . . the State's sovereign immunity was not compromised." *Id.* (citing Arizona, 460 U.S. at 613-14, 103 S. Ct. at 1388-89).

On appeal, the defendants attempted to circumvent Arizona by stressing that the United States did not initiate the Mille Lacs I action;[9] it was appearing only as a trustee-intervenor. *Mille Lacs Band of Chippewa Indians* v. *Minn.*, 124 F.3d 904, 913 (8 th Cir.1997) ("Mille Lacs II"), aff'd on other grounds, 526 U.S. 172, 119 S. Ct. 1187, 143 L.Ed.2d 270 (1999). The Eighth Circuit did not find that distinction "controlling[,]" explaining that "[t]he United States ha[d] fully participated in all proceedings on behalf of the [Chippewas][,]"

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[9] The United States did not originally initiate the lawsuit in Arizona. But, as a subsequent intervenor, the United States did initiate the claims on behalf of the Tribes prior to the time the they sought intervention.

and, "[a]s an intervenor, it ha[d] the right to continue the suit even without the presence of the [Chippewas]." *Id.* at 913 (citing *Diamond* v. *Charles*, 476 U.S. 54, 68, 106 S. Ct. 1697, 1706-07, 90 L.Ed.2d 48 (1986)). Thus, the Court held "because the United States has the right to bring these claims in federal court, the State's sovereign immunity is not compromised and the Eleventh Amendment does not bar these claims." *Id.* (citing Arizona, 460 U.S. at 614, 103 S. Ct. at 1388-89).

Significantly, in a decision recently affirmed by the Second Circuit, Judge Curtin reached the same result. See Seneca Nation I, 26 F. Supp.2d at 564. There, as here, a group of New York indians (the Seneca) sought, among other things, a declaration that the State had illegally appropriated certain lands from them in violation of their treaty rights and the Nonintercourse Act. A number of years after the commencement of Seneca Nation I, the court granted a motion by the United States to intervene. The parties in Seneca Nation I agreed that the Eleventh Amendment did not bar the United States' claims against the State. Just as in the present case, however, the parties disputed the effect of that Amendment given the presence of the United States as an intervenor. Judge Curtin held that the Eleventh Amendment did not prohibit the Seneca Indians from proceeding with their claims against the State of New York, several State officials and a State agency. *Id.* at 563-565.

Judge Curtin justified this result by first pointing out, as the State conceded there, that "courts have regularly permitted Indian tribes to join or to intervene in cases brought by the United States against States, either as a matter of right under Fed. R. Civ. P. 24(a) or permissibly under Rule 24(b)." *Id.* at 564 (citing

Nevada v. *United States*, 463 U.S. 110, 103 S. Ct. 2906, 77 L.Ed.2d 509(1983); Arizona, 460 U.S. at 614-15, 103 S. Ct. 1382, 75 L.Ed.2d 318). Next, relying upon Mille Lacs II, he explained that even though "[t]he Eleventh Amendment protects a State from being hailed into federal court[,]" because the United States was a plaintiff in that acti n, "the State [wa]s properly before [that] federal court." *Id.* Then, as in Arizona, Judge Curtin reasoned because "[t]he Senecas' and the United States' claims [were] virtually identical[,] [a]llowing the Senecas' claims to proceed does not further compromise the State's sovereign immunity." *Id.* As an additional reason for permitting the Senecas to proceed with their claims in that action, Judge Curtin pointed to reasons of judicial economy. *Id.* at 564-565.

Recently, in a terse one paragraph opinion, the Second Circuit affirmed for "substantially the reasons stated by Judge Curtin[.]" Seneca Nation II, 178 F.3d 95, 1999 WL 308522, at *1. The Second Circuit was careful to point out, however, "that the State of New York retains its Eleventh Amendment immunity to the extent that the Seneca . . . Indians raise claims or issues that are not identical to those made by the United States." *Id.* (citing Arizona, 460 U.S. at 614) (emphasis added).

Here, the State contends that reinstatement of the Cayugas' claims against it would expand the court's judicial power over this controversy, which in turn would compromise the State's Eleventh Amendment immunity, in direct conflict with Arizona. After a hair-splitting comparison of the United States' complaint and the Cayuga complaint, the State asserts that reinstatement of the Cayugas' claims against the State agencies would improperly enlarge the court's power in

three ways. First, such improper enlargement would result because supposedly the United States and the Cayugas are not relying on the same legal theories. The United States is alleging only a Nonintercourse Act violation, whereas the Cayugas are alleging other theories of recovery, such as claims based upon the United States and New York Constitutions. Second, the State contends that the United States and the Cayugas are not seeking the same relief; the relief which the Cayugas are seeking is more specific than that which the United States is seeking. Unlike the United States, the Cayugas are seeking injunctive relief and "various orders and accountings[.]" Def. Memo. at 72 (citations omitted). Third, the State claims that the United States and the Cayugas are advancing different legal arguments with respect to ejectment. The Nation is arguing that ejectment is a legal remedy, and thus equitable factors should not be a factor in awarding such relief. On the other hand, the United States is arguing that equitable factors should be considered, but only after a trial.

There are two additional factors which the State believes show that its Eleventh Amendment immunity is not defeated despite the presence of the United States as a plaintiff-intervenor. First, the United States has "made clear that it ha[s] its own separate interest in the disputed property as well as an interest in protecting any property in which the Cayugas have an interest." *Id.* at 72. The State also points to that fact that in connection with the United States' motion to intervene, the United States took the position that the Cayugas could not adequately represent its interests. *Id.*

Taking a broader view, the Cayugas and the United States counter that because the basic nature of the relief which they are seeking is the same (*i.e.*, ejectment, trespass damages and costs), even though "there may be a degree of difference in specificity in the relief requested" that fact should not obfuscate that "[a]t bottom, the United States[] . . . seeks to establish the right of possession to the subject lands[,]" and thus its "claim is identical to the [Cayugas'] claims[.]" Response of the Plaintiff-Intervener[sic], United States, to Defendant, State of New York's Motion to Dismiss ("U.S.Resp.") at 2. Consequently, the Eleventh Amendment concerns identified in Arizona are not implicated here.

The Supreme Court in Arizona gave no clear guidance as to how to determine whether claims or issues are "new," so as to give rise to possible Eleventh Amendment concerns. The Arizona Court did hold, however, that where the Tribes sought to intervene in an action by the United States to adjudicate water rights, the states could "no longer . . . assert . . . immunity with respect to the subject matter of th[at] action." *Arizona*, 460 U.S. at 614, 103 S. Ct. at 1388 (emphasis added). Interestingly, at the same time the Arizona Court stated that "[t]he Tribes [were] not seek[ing] to bring new claims or issues against the state," it recognized that in the Tribes' motion to intervene they made "claims for additional water rights to reservation lands." *Id.* at 612, 103 S. Ct. at 1387 (emphasis added). Thus, as this court reads Arizona, "new claims or issues" may be raised in a situation such as that presented therein, so long as those issues or

claims encompass the same subject matter as the original claims or issues.[10]

In the present case, regardless of whether the focus is on the issues or claims asserted, the relief sought or the subject matter, the court is convinced that for all practical purposes the Cayugas' and the United States' complaints are "virtually identical" so as to defeat the State's Eleventh Amendment immunity. See *Seneca Nation I*, 26 F. Supp.2d at 564. Consistent with Arizona and the Second Circuit's recent comment in Seneca II, however, to the extent that there is proof at the upcoming trial that the Cayugas are raising new claims or issues beyond those which the United States alleges, the State's claim of Eleventh Amendment immunity may come into play. The court will cross that bridge if and when it comes to it.[11]

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[10] Neither Seneca Nation I nor the Mille Lacs cases shed any light on the matter of identity of issues or claims under Arizona. Despite the Arizona Court's specific reference to "claims or issues," in Seneca Nation I, with no discussion, the district court declared that the Senecas and the United States were seeking "identical relief[.]" *Seneca Nation I*, 26 F.Supp.2d at 560 (emphasis added). Later in that same opinion, but again with no discussion, the court remarked that "claims" of the Seneca Nation and those of the United States "[we]re virtually identical" and thus the Eleventh Amendment was not a bar to the Senecas' claims. *Id.* at 564 (emphasis added). In Mille Lacs I the court commented that the "relief" sought was the "same" and thus the State of Minnesota's sovereign immunity was not compromised, but it did not elaborate. See *Mille Lacs I*, 853 F.Supp. at 1128 (citation omitted). The issue of the identity of the relief sought by the United States and the Band (or, for that matter, the identity of the claims or issues raised) was not before the Eighth Circuit in Mille Lacs II.

[11] The court is hard-pressed at this point to see what such "new claims or issues" might be.

In another effort to avoid the clear import of Arizona, the State suggests that the fact the Cayugas, as opposed to the United States, commenced this action, renders Arizona inapplicable. As mentioned earlier, the Eighth Circuit has already rejected that argument, finding that "observation, while true . . . is not controlling[ ]" given that the "United States ha[d] fully participated in all proceedings on behalf of the Bands[,]"[12] and "[a]s an intervenor, it ha[d] the right to continue the suit even without the presence of the Bands." *Mille Lacs II*, 124 F.3d at 913 (citations omitted). What is more, in Seneca Nation I, as in the present case, the United States did not initiate that lawsuit; rather, it intervened on the Senecas' behalf a number of years after the fact. Obviously the Second Circuit did not find that procedural distinction significant; and neither does this court.

In short, in this court's opinion Arizona and its progeny leave little doubt that here, where the United States has intervened on behalf of the Cayugas, the State and its agencies are not entitled to invoke the Eleventh Amendment. Indeed, it would border on the absurd if the apparent ultimate wrongdoer in this case, the State, could avoid suit on the basis of the Eleventh Amendment. Moreover, because the Cayugas could join or intervene in the United States' case against the State and its agencies, the interests of judicial economy would not be served if this court were to stand by its July, 1996, ruling that the Eleventh Amendment bars the Cayugas' claims against the State agencies. See *Seneca Nation I*, 26 F.Supp.2d at 564-55. Last, but not

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[12] The United States was granted permission to intervene in the Mille Lacs case approximately three years after the commencement of that case.

least, because it is difficult to imagine litigation more critical to the Cayugas' welfare than this, the court firmly believes that their participation should not be discouraged. See *Arizona*, 460 U.S. at 615, 103 S. Ct. at 1388.

4. Pennhurst

Lastly in an effort to circumvent Arizona, relying upon Pennhurst, the State bluntly asserts, "The United States Supreme Court has held that a State's Eleventh Amendment immunity from suit by private plaintiffs is not defeated because the United States has intervened in the lawsuit." Def. Memo. at 73. The State vastly misapprehends the Court's holding in Pennhurst, however. Pennhurst stands for the proposition that the "Eleventh Amendment bars suit alleging violation of state rather than federal law[.]" See *Couer d'Alene III*, 521 U.S. at ___, 117 S. Ct. at 2046 (O'Connor, J.) (Concurring in part and concurring in judgment) (emphasis added). Indeed, consonant with earlier Supreme Court precedent, the Pennhurst Court reiterated that "the Eleventh Amendment does not bar the United States from suing a State in federal court . . ., [but] the United States does not have standing to assert the state-law claims of third parties." Pennhurst, 465 U.S. at 103 n. 12, 104 S. Ct. at 909 n. 12 (citation omitted). Here, the court does not read the United States' complaint as pursuing state law claims on behalf of a third-party. Instead, the United States is seeking to enforce the Cayugas' federal rights-statutory and otherwise. Accordingly, the State's Eleventh Amendment immunity does not survive based on Pennhurst.

5. Individual State Defendants

As mentioned earlier, the State argues that *Couer d'Alene III* mandates dismissal of the Cayugas' claims against the individual State defendants. The court agrees that the individual State defendants are entitled to dismissal of the Cayugas' claims as against them, but the basis for that dismissal is not *Couer d'Alene III*.

A careful review of the voluminous record in this case reveals that earlier in this litigation the Cayugas took the position that they are seeking only ejectment against the individual State defendants.[13] Based upon that prior concession, combined with the fact that the court is not going to allow ejectment as a remedy, *Couer d'Alene III* is not relevant in terms of the individual State defendants. Nevertheless, the court will reconsider its prior Eleventh Amendment ruling with respect to those defendants. As just explained, however, the reason is not *Couer d'Alene III*, but rather the unavailability of ejectment as a remedy. In other words, whether the individual State defendants enjoy Eleventh Amendment immunity from the Cayugas' claims is immaterial given their concession that the only relief they are seeking from those defendants is ejectment-relief which the court refuses to award against them or any defendant in this action.

C. Prejudgment Interest

As the parties are well aware, in Cayuga VIII this court addressed the availability generally of prejudgment interest. The State joined in the Counties' arguments opposing such an award-arguments which for the most part the court rejected. See *Cayuga VIII*, 1999

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[13] See discussion *supra* at 8-9.

WL 224615, at *15-*25. The State offers an additional reason as to why it should not be held liable for prejudgment interest-a reason which the court deliberately waited until now to address.

According to the State, "the argument against prejudgment interest is even more compelling" where it is concerned because such "interest is not allowable against a sovereign state without express legislative authority or an express contractual agreement," neither of which are present here. State Defendants' Memorandum of Law in Support of Motion in Limine ("St.Memo.") at 4. This is so, asserts the State, "even when the [interest] is owed to the United States." *Id.* at 5. Thus, positing that the United States cannot recover interest from a state, the State further reasons that the Cayugas, who have an unique trust relationship with the United States, also should not be allowed to recover prejudgment interest against the State. Otherwise, argues the State, the anomalous situation would arise where the Cayugas' rights to recover prejudgment interest would be greater than those of the United States.

The Tribe, the only party to acknowledge this separate prejudgment interest argument by the State, responds that "[t]he Supreme Court clearly upholds awards of prejudgment interest against states. . . ." Consolidated Response of the Plaintiff-Intervenor Seneca-Cayuga Tribe of Oklahoma to the Motions in Limine Filed by the State of New York and by Cayuga and Seneca Counties and to the Motion to Decertify Defendant Class and on other Pre-trial Issues Filed by the Non-State Defendants at 9. Furthermore, according to the Tribe, the lack of a specific statute or contractual agreement requiring the State to pay

prejudgment interest is not a barrier to the payment of such interest in this case because the Supreme Court has recognized "the states' federal common-law obligation to pay prejudgment interest on debts owed to the Federal Government." *Id.* (citing *United States* v. *Texas*, 507 U.S. 529, 533-39, 113 S. Ct. 1631, 1634-1637, 123 L.Ed.2d 245 (1993)).

Turning first to the State's arguments opposing an award of prejudgment interest, the only two cases which the State cites in this regard, *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 71 S. Ct. 552, 95 L.Ed. 738 (1951), and *United States* v. *North Carolina*, 136 U.S. 211, 10 S. Ct. 920, 34 L.Ed. 336 (1890), do not support its argument. In North Carolina, the United States sued to recover post-maturity interest on bonds issued by a subsidiary of the State of North Carolina. Admittedly, the Court there did restate the general principle that interest "is not to be a warded [*sic*] against a sovereign government unless its consent to pay interest has been manifested by an act of its legislature, or by a lawful contract[;]" and thus the Court held that North Carolina could not be compelled to pay interest. *North Carolina*, 136 U.S. at 216, 10 S. Ct. at 922 (citations omitted).

The continuing vitality of North Carolina was seriously called into question, however, by *West Virginia* v. *United States*, 479 U.S. 305, 107 S. Ct. 702, 93 L.Ed.2d 639 (1987). There, the Supreme Court held that "the State of West Virginia [wa]s liable for prejudgment interest on a debt arising from a contractual obligation to reimburse the United States for services rendered by the Army Corps of Engineers." *Id.* at 306, 107 S. Ct. at 704. Based upon West Virginia law, which exempted it from liability for prejudgment interest

unless it has consented to payment of the same, West Virginia argued that it should also be exempt from paying prejudgment interest to the United States. Flatly rejecting that argument, the Court explained that sovereign immunity was the basis of West Virginia's state law exemption from payment of prejudgment interest. See *id.* (citation omitted). However, "[b]ecause States have no sovereign immunity as against the Federal Government . . . , any rule exempting a sovereign from the payment of prejudgment interest not only does not apply of its own force to the State's obligations to the Federal Government . . ., but also does not represent a policy the federal courts are obliged to further." *Id.* at 311-312, 107 S. Ct. at 707 (citations and footnotes omitted). Put another way, the rule of state immunity from interest applied in North Carolina does not apply where, as here, a state retains no sovereign immunity.

In arguing that it had no obligation to pay prejudgment interest, the State of West Virginia relied upon North Carolina, just as the State does here. But, as the Court in West Virginia did not hasten to add, North Carolina"was decided before *United States* v. *Texas*, 143 U.S. 621, 12 S. Ct. 488, 36 L.Ed. 285 (1892), in which this Court held dispositively that States retain no sovereign immunity as against the Federal Government." *Id.* at 311 n. 4, 107 S. Ct. at 707 n. 4 (emphasis added); see also Vermont Agency of Natural Resources, 162 F.3d at 201 (citations omitted) ("As against the United States . . . , States have no sovereign immunity."). In this court's opinion, Texas and its progeny seriously undermine, if not completely erode, the State's argument that prejudgment interest is only

recoverable by the United States where there is a statute or contract expressly authorizing the same.

Likewise, *Tillamooks* does not advance the State's argument against prejudgment interest. In sharp contrast to the present case, the tribal plaintiffs in Tillamooks were seeking prejudgment interest from the United States. In reversing the Court of Claims' interest award, the Tillamooks Court did invoke the "traditional rule" that interest cannot be awarded against a sovereign absent a statutory or contractual obligation to pay the same. See *Tillamooks*, 341 U.S. at 49, 71 S. Ct. at 552. Very different concerns arise, however, when individual plaintiffs are seeking interest from a state, as opposed to when the United States is seeking interest from a state-another sovereign. "Suits by the United States against a state do not denigrate the dignity and respect owed the states in the way that suits by individuals do." *Vt. Agency of Natural Resources*, 162 F.3d at 213 (Weinstein, J. dissenting); see also *United States* v. *Texas*, 143 U.S. at 646, 12 S. Ct. at 494 ("[T]he suability of one government by another government . . . does no violence to the inherent nature of sovereignty.") In fact, "[t]he possibility of suits by the United States against the states is essential to our federal system." *Id.* It would be incongruous indeed to allow the United States to sue a state, but then not to afford the United States a full measure of relief, including, if otherwise proper, prejudgment interest.

At the end of the day the court agrees with the Tribe that the United States is entitled to recover prejudgment interest from the State; but before moving on the court is compelled to comment upon the Tribe's reliance upon Oneida County, *New York* v. *Oneida*

Indian Etc., 470 U.S. 226, 105 S. Ct. 1245, 84 L.Ed.2d 169 (1985), ("Oneida V"[14]) and *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 100 S. Ct. 2716, 65 L.Ed.2d 844 (1980), in this context. The Tribe overstates the significance of both of those cases in terms of their relevance to the interest issue. The issue in Sioux Nation was the federal government's obligation to pay just compensation, including interest, for its taking of tribal property. Sioux Nation did not speak to the issue of a state's obligation to pay prejudgment interest to the United States.

Likewise, Oneida V is readily distinguishable on the interest issue. The State, although it was third-party defendant in that action, was not a defendant. Nor did the United States intervene on behalf of the *Oneida*. In reciting the background, the Court in *Oneida V* accurately stated that in the damage phase of the action, the district court "awarded the Oneidas damages in the amount of $16,694, plus interest[.]" *Oneida V*, 470 U.S. at 230, 105 S. Ct. at 1249. In that same recitation, the Court further explained that the Second Circuit affirmed the district court's rulings as to liability and indemnification, but remanded for further proceedings on the amount of damages.[15] The propriety of an interest award was not before either the Second Circuit or the Supreme Court. Consequently, as with Sioux Nation, *Oneida V* is not illuminating in terms of

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[14] Oneida V originated in this district court and is commonly referred to as the "test case." As with most Eastern land claim cases, it engendered many written decisions, including this one by the Supreme Court.

[15] Not so coincidentally, that remaining damage issue, which arguably includes the issue of prejudgment interest, is currently pending before this court.

whether the State is obligated to pay prejudgment interest in this particular case. In any event, as the foregoing discussion demonstrates, as with the Eleventh Amendment issue, the United States' presence as a plaintiff-intervenor in this action changes the complexion of the prejudgment interest issue relative to the State.

IV. Imperial Irrigation Analysis

Before moving on, it is necessary to clarify the issue presently before the court, especially given the Cayugas' fairly recent attempts to cast the ejectment issue in terms of possible leaseholds. The Cayugas boldly state that "[a]t no time in this litigation have [they] expressed in any written or oral submission to the Court that they seek to evict[16] thousands of people from their homes[.]" Pl. Memo. at 30-31 (emphasis added). The Nation's complaint, the Tribe's complaint and the United States' complaint belie this assertion. Those complaints are unequivocal when it comes to ejectment; they uniformly demand a declaration restoring the Cayugas to "immediate possession" of the subject property. Nation Co. at 23, ¶ 3; Tribe Co. at 8, ¶ 3; and U.S. Co. at 6, ¶ 2. In no uncertain terms, the Cayugas also are explicitly seeking to "eject any defendant claiming their chain of title through the 1795 and 1807 New York State 'treaties[.]" *Id.* (emphasis added); see also U.S. Co. at 6, ¶ 2 (emphasis added) (seeking a declaration "that defendants are ejected

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[16] To the extent that the Cayugas may be suggesting that there is a distinction between eviction and ejectment, the court is not convinced-at least in this context. See *Pernell* v. *Southall Realty*, 416 U.S. 363, 375, 94 S. Ct. 1723, 1729, 40 L.Ed.2d 198 (1974) ("ejectment . . . permit[s] the plaintiff to evict one who is wrongfully detaining possession and to regain possession himself[]").

from the subject property[]"). Not only that, the Cayugas have been aware at least since 1983 that this court viewed their complaint as "present[ing] a possessory claim, basically in ejectment [.]" *Cayuga Indian Nation of New York* v. *Cuomo*, 565 F. Supp. 1297, 1317 (N.D.N.Y. 1983) ("Cayuga II") (citation and internal quotation marks omitted) (emphasis added).

Perhaps to assuage the fears of defendants as well as the public at large, during the evidentiary hearing the Cayugas retreated from that hard-line approach, indicating instead a willingness to enter into long-term leases with the current landowners. In their post-hearing memorandum the Cayugas continue to try and divert the court's and the defendants' attention away from ejectment, yet they still do not go so far as to affirm that they will never actually seek ejectment of current landowners. See Pl. Memo. at 30-31 (emphasis added) (the Cayugas contemplate[] a change in title so that they . . . will be recognized as the rightful owners of the land, but intend to thereafter accommodate the needs of most current possessors[]"). In fact, the Cayugas readily admit that they will "seek physical eviction of . . . those few persons who refuse to negotiate on reasonable terms."[17] *Id.* at 48 (emphasis added). In any event, given their newfound willingness to "enter into arrangements . . . which would allow

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[17] It is self-evident that what may be "reasonable" to one person is not necessarily "reasonable" to another. Thus, without attributing any malevolence to the Cayugas, the court can easily envision a scenario where after offering what to them seems like an eminently reasonable lease, that offer is rejected. Under that version of events, which in the court's view is all too likely, the Cayugas' suggestion that only a "few persons" would be evicted seems overly optimistic. See Pl. Memo. at 48.

the[m] to live in harmony with their neighbors[,]" the Cayugas cavalierly suggest that the defendants' evidence presented at the ejectment hearing was "essentially irrelevant[.]" *Id.* at 27.

The court wholeheartedly disagrees; the defendants' evidence is highly relevant to the issue currently before the court-the availability of ejectment as a remedy. The court appreciates the Cayugas' recent conciliatory efforts. The court is not free to ignore the fact, however, that from the outset ejectment is one of several remedies which the Cayugas have been seeking, and their claims also have been framed in terms of ejectment. And, as the Cayugas are fully aware, the availability of ejectment as a remedy was the discrete issue which was the subject of the evidentiary hearing. Therefore, despite the Cayugas' efforts to broaden the ejectment issue to include the possibility of long-term leases, the court adheres to its view that the only issue with which it is concerned now is whether the Cayugas are entitled to ejectment as a remedy for the loss of their homeland. In short, the court will not permit the issue of ejectment to be obscured by the Cayugas' fairly recent suggestion that long-term leases may be another means of resolving this litigation.

Having clarified the narrow issue presently before the court, the court will now turn to an examination of Imperial Irrigation and its applicability to the present case. In that case, the United States, on its own behalf and on behalf of the Torres-Martinez band of Mission Indians, sued two water districts for continuing trespass. This alleged trespass occurred over the course of sixty-eight years when irrigation water, which drained from the districts' agricultural fields, flowed into an inland salt water lake, thus raising the water level of

that lake, which in turn caused flooding to tribal lands. Ultimately finding that the water districts failed to prove that they had consent to trespass on the tribal lands, the court was forced to address the issue of remedies.

The plaintiffs in Imperial Irrigation sought an injunction, but at trial they sought ejectment, arguing that the latter "was an automatic remedy for . . . trespass." *Imperial Irrigation*, 799 F.Supp. at 1068. The court refused to grant ejectment, first recognizing that "historically" ejectment was "a discrete cause of action[,]" which the plaintiffs there had not "pled, briefed, or proven." *Id.* (citation omitted). Second, the court distinguished *Oneida Indian Nation of New York* v. *Oneida County*, 719 F.2d 525 (2d Cir.1983), noting that although the Second Circuit analogized the tribal plaintiffs' claim therein to common law ejectment, "the court did not hold that ejectment was a remedy for trespass, particularly not the 'automatic' remedy plaintiff urges." 799 F. Supp. at 1068. The Imperial Irrigation court also relied upon "precedent applying equitable factors and thereby limiting relief otherwise available for Indian claims." *Id.* (citing *Brooks* v. *Nez Perce County*, 670 F.2d 835 (9 th Cir. 1982); and Oneida V, 470 U.S. 226, 105 S. Ct. 1245, 84 L.Ed.2d 169). These reasons, in combination with the court's belief that "it [wa]s equitable to balance the hardships . . . since the rights of so many farmers would be significantly impacted by ejectment," resulted in a finding "that an equitable analysis [wa]s appropriate before issuing any final orders other than for monetary damages." *Id.* Finally, the court observed that "under the general common law, a party injured by a continuing trespass generally recovers damages and a permanent injunction

requiring removal of the encroachment." *Id.* (citations omitted).

In light of the foregoing, the court treated plaintiffs' ejectment request as a request for a permanent injunction, "and . . . analyze[d] [it] pursuant to the equitable factors suggested by the Restatement of Torts for determining the appropriateness of an injunction against trespass[,]" which are as follows:

> (1) The nature of the interest to be protected;
>
> (2) The relative adequacy of injunctive and other remedies available to the plaintiff;
>
> (3) Any unreasonable delay of the plaintiff in initiating the action;
>
> (4) Any related misconduct on the part of the plaintiff;
>
> (5) The relative hardship of the parties if the injunction is granted or denied;
>
> (6) The interests of third persons and the public;
>
> (7) The practicability of framing and enforcing the injunction.

Id. (citing Restatement (Second) of Torts § 936(1)(a)-(g)).

Reviewing those factors in light of the proof adduced at trial, the Imperial Irrigation court found that injunctive relief was not appropriate because the tribal plaintiffs had no historical ties to the land, and they had "unreasonably delayed some 54 years in bringing th[a]t lawsuit." *Id.* at 1069. There was also misconduct on the part of the United States, though, in that it did not take

any measures to protect the tribal plaintiffs' property rights. What seemed to most heavily influence the Imperial Irrigation, however, was that in balancing the hardships the court found that "[a]n injunction would render useless thousands of acres of cultivated farmland to the detriment of innocent framers who are blameless in this lawsuit and who have worked hard to cultivate desert lands." *Id.* In short, the court relegated "the interest[ ] of the 300 band members to their land . . . to the agricultural industry in . . . [the] counties[.]" *Id.* But, even though the court in Imperial Irrigation refused to grant injunctive relief, it did "award monetary damages equal to the fee value of the property to compensate the band for all future damages based upon trespass." *Id.*

On July 9, 1998, this court held that it would rely upon the Restatement factors enumerated in Imperial Irrigation in determining the availability of ejectment as a remedy in this case. Transcript of Oral Argument (July 9, 1998) at 101. Neither at that time or shortly thereafter did the Cayugas move for reconsideration of that ruling; and in accordance therewith the court conducted an evidentiary hearing. Despite that lapse, in both their pre-hearing and post-hearing submissions the Cayugas argue at some length that because they are seeking the legal remedy of ejectment, as opposed to equitable, injunctive relief, the Restatement factors should not figure into this court's analysis of the ejectment issue. It is tempting to respond, as do the Counties, that it is simply too late in the day for this argument. All parties have been fully aware since July 9, 1998 that the court intended to rely upon the Imperial Irrigation factors in determining the availability of ejectment as a remedy in this case. However,

because this court has not yet delineated its reasons for adopting the Imperial Irrigation approach here, it will do so below.

Given this court's prior rulings that the 1795 and 1807 cessions of land violated the Nonintercourse Act, the Cayugas argue that the court is "required to enter a decree delivering the 'sole and exclusive possession' of such lands to the[m][.]" Pl. Memo. at 17 (emphasis added) (quoting *United States* v. *Brewer*, 184 F. Supp. 377 (D.N.M.1960)). Equitable factors only come into play, according to the Cayugas, in the administration of such an order. So, for example, despite their fervent belief that "all of the land in the subject area should be transferred to the[m,]" as previously discussed, the Cayugas "expect to enter into reasonable long-term leases and easements with most homeowners, farmers, businesses, utilities and the like, perhaps with the assistance and supervision of the Court, or a Master appointed by the Court." Nation Witness and Exhibit List at 2-3.

The Cayugas offer several reasons as to why "equitable factors cannot be used by the Court to deprive the[m] of their possessory right to treaty-recognized reservation lands." Pl. Memo. at 15. First of all, the Cayugas suggest that "[a]nything short of an order restoring the[m] to possession of their lands would be an extinguishment of Indian title without congressional consent." *Id.* at 16. Next, because "Congress determined that the purposes of the Non-Intercourse Act could best be accomplished by rendering 'null and void' all cessions of Indian land lacking federal approval[,]" this court cannot "rewrite that Act or substitute its judgment for that of Congress[]" by refusing to order ejectment on equitable grounds. *Id.*

at 20. Then, after painstakingly distinguishing Imperial Irrigation, the Cayugas conclude that the equitable analysis employed therein has no place in this litigation because of the factual differences between that case and the present one.

On the surface, the Cayugas' arguments opposing an equity based analysis of the ejectment issue are somewhat compelling. Closer examination of those arguments reveals two inherent weaknesses, however. First of all, the legal authority which forms the basis for these arguments is readily distinguishable. Second, by selectively quoting case law, as often occurs in particularly contentious and zealous litigation, the Cayugas have significantly overstated the relevance of the same to the unique situation which this litigation presents.[18]

Relying primarily upon *United States* v. *Santa Fe Pac. R. Co.*, 314 U.S. 339, 62 S. Ct. 248, 86 L.Ed. 260 (1941); *United States* v. *Boylan*, 265 F. 165 (2d Cir. 1920); and *United States* v. *Brewer*, 184 F.Supp. 377 (D.N.M. 1960), the Cayugas make a number of broad assertions in connection with the availability of ejectment as a remedy. For example, they contend that

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[18] The Cayugas are not alone in their, at times, overzealous approach to this litigation. For example, the defendants did not examine in-depth the propriety of employing equitable factors to analyze the ejectment issue herein. Instead they simply declare, "It is well established that equitable factors must be weighed in assessing the propriety of ejectment as a form of relief." Def. Memo. at 31 (emphasis added) (citing Imperial Irrigation, 799 F. Supp. at 1069; *Yankton Sioux* v. *United States*, 272 U.S. 351, 47 S. Ct. 142, 71 L.Ed. 294 (1926)). As should be apparent from the discussion above, the use of equitable factors in this context is anything but "well established." Moreover, neither Imperial Irrigation nor Yankton Sioux directly support such a broad proposition.

"federal law commands" the "return of land along with damages[.]" Pl. Memo. at 17 and 15. In a similar vein, the Cayugas maintain that "[t]he only manner by which lands wrongfully possessed [by non-Indians] may be returned to their rightful owner is through . . . ejectment[,]" and "[e]jectment is the only proper remedy in these Indian treaty cases." Pl. Memo. at 15 and 17 (citations omitted) (emphasis added).

The court does not read Santa Fe, Boylan and Brewer (or, for that matter, any of the other cases which the Cayugas cite in this regard) so broadly. First, Santa Fe does not speak to the issue of ejectment. Rather, the Santa Fe Court focused on the availability to Indians of an accounting for trespass upon their land. See *Oneida V*, 470 U.S. at 235, 105 S. Ct. at 1252 (citation omitted). Furthermore, there are a number of striking differences between Boylan and Brewer and the present case.

In Boylan, the first in a long history of land claim litigation by the Oneida Indians, the United States instituted an action on the Indians' behalf seeking restoration of thirty-two acres of land, which had formed a part of the original Oneida Indian reservation. In that case, through a series of transactions beginning in 1885, some individual Oneida Indians conveyed a tract of reservation property to a non-Indian. The non-Indian in turn commenced a state court partition proceeding, which purportedly extinguished the Oneida Indians' interest in the subject property. During that time, the Oneida Indians who had not conveyed any reservation land, remained on that property; but in a partition proceeding, the state court ordered those remaining Oneidas ejected.

Thereafter, on behalf of the Oneidas, the United States instituted a federal court action on the theory that Congressional approval was required before the individual Oneidas could convey any reservations lands. Agreeing with that theory the district court, and ultimately the Second Circuit, found "the partition action and judgment and the sale made thereunder . . . void, so far as they eject the Indians from the possession of the property." *Boylan*, 265 F. at 174. Thus, in 1920 the Second Circuit "approved . . . the decree restoring the ejected Indians to possession." *Id.*

It is likewise true that in Brewer the court held that non-tribal defendants were not entitled to remain in possession of approximately .485 acres of land located within the Pueblo of San Ildefonso ("the Pueblo"), because those defendants had not acquired title with the approval of the Secretary of the Interior, as statutorily required. *Brewer*, 184 F.Supp. at 380. The defendants were not entitled to remain in possession in Brewer even though they had erected $9,000.00 worth of improvements on the property. However, because the Brewer court did not want "to be precipitous in evicting the defendants, who [we]re apparently of high character, and ha[d] not violated any of the Laws of the Pueblo, or of the United States," it allowed them six months to leave, and it also allowed them "to take so much of the improvements and the building materials with them as they [were] able so to do." *Id.*

There are three differences which are especially significant between the two cases just discussed and the present case. Neither Boylan nor Brewer involved land claim litigation, let alone on the scale of this case. Here, ejectment would result in the displacement of countless private and public landowners from approxi-

mately 65,000 acres of land, whereas Boylan involved only thirty-two acres of land and Brewer a mere .485 of an acre. Thus, given the small parcels of land at issue in Boylan and Brewer, ejectment impacted a relatively inconsequential number of people. Moreover, unlike the present case, in both Brewer and Boylan, those who were ejected had not resided on the property for a long period of time. This court will not, as the Cayugas impliedly suggest, ignore these critical distinctions, especially where to do so would result in far reaching consequences well beyond anything contemplated in Boylan and Brewer. Furthermore, the court does recognize the possessory nature of the Cayugas' claims. See *Cayuga Indian Nation II*, 565 F. Supp. 1297, 1317 (N.D.N.Y. 1983) ("The Oneida decision and its concurrence make it clear that the complaint before this Court presents a possessory claim[.]"). But when it comes to the availability of remedies, as opposed to broader issues such as justiciability, as this court stated fairly early on in this litigation, justice requires that "equitable factors . . . be carefully weighed before any relief is granted." *Id.* at 1311 (citation omitted).

Thus, even in the face of the Cayugas' repeated and strenuous insistence to the contrary, the court will not abandon its prior ruling that equitable factors should be considered in conjunction with the issue of ejectment. As just discussed, the court does not find convincing the Cayugas' arguments opposing an equitable based analysis of ejectment. Furthermore, the Cayugas do not offer an alternative way of analyzing the ejectment issue, other than to assert that they are entitled to that remedy. To the best of the court's knowledge, no other Indian land claim case in the country has progressed to

this point. Other similar cases have either settled,[19] or resulted in defeat for the Indians.[20] Thus because the court has very little precedent which is even remotely relevant to guide it on the ejectment issue, despite the differences between the present case and Imperial Irrigation, the latter will provide the analytical framework for the availability of ejectment in this case.

Additionally, after years of acknowledging that equitable factors will play a role in fashioning a remedy in this case, the time has finally come to invoke those equitable principles rather than just paying lip service to the same. Equitable principles are no longer an abstract concept, but a reality which the Cayugas, as well as the defendants must face-a reality which will impact the remedy of ejectment and perhaps the upcoming damage phase of this litigation.

Before separately analyzing each of the Restatement factors repeated in Imperial Irrigation, it should be noted that "a court [should] take[] into account all of th[os]e factors[;]" but "[s]ometimes a single factor, such as the public interest, turns out to be clearly dominant." Restatement (Second) of Torts § 936 cmt. b (1977) (emphasis added). And although "each of the factors . . . must be separately weighed and appraised[,]" in the end it is a "comparative appraisal of all of the factors in the case, balanced against each other, and

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[19] See, e.g., Puyallup Tribe of Indians Settlement Act of 1989, 25 U.S.C. §§ 1773-1773j (West Supp. 1999); Florida Indian land Claims Settlement Act of 1982, 25 U.S.C. §§ 1741-1749 (West Supp. 1999); Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721-1735 (1983 & West Supp. 1999).

[20] See, e.g., *Mashpee Tribe* v. *New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979); *Oneida Indian Nation* v. *New York*, 649 F. Supp. 420 (N.D.N.Y. 1986), aff'd, 860 F.2d 1145 (2d Cir. 1988).

considered together[]" which determines the appropriateness of an injunction against a tort, such as trespass. *Id.* Keeping this comparative approach firmly in mind, the court will now turn to an examination of the Restatement factors in light of the proof adduced during the September, 1998, evidentiary hearing.

A. Nature of the Interest

Obviously the interest to be protected here is property. Because they have sustained great hardships as a result of losing their homeland, and because of the many anticipated positive effects which would inure to their benefit if the land is returned to them, the Cayugas argue that this factor weighs in favor of ejectment. In terms of hardship, the Cayugas assert that the loss of their homeland has had "far reaching negative, cultural, social, religious and economic consequences[.]" Pl. Memo. at 32. One example of this negative impact is that only "roughly . . . 10 percent[]" of the Cayugas in New York today are able to speak their native language. Tr. I at 46. Furthermore, undoubtedly the loss of the Cayugas' homeland attributed greatly to their assimilation into white society and concomitant loss of traditional ways of life. See *Id.* at 45-46. By the same token, the Cayugas anticipate that the return of their homeland would "foster aboriginal kinship, political organizations and native religion[,]" as well as "economic development." Pl. Memo. at 33 and 34.

The defendants acknowledge that traditionally "the law regards [property] as unique[.]" See *Imperial Irrigation*, 799 F.Supp. at 1069. The Cayugas' purported interest in the subject land should "not weigh heavily" in the court's decision regarding ejectment, however, because the Cayugas have failed to show that

they had "a specific or unique relationship with the land" before they left that area. Def. Memo. at 33. Furthermore, many "unique" qualities of the subject property are, in the defendants' view, directly attributable to them because they "have created and nurtured" this land, "mold[ing] [it] into the thriving communities that exist today." *Id.* at 36. Therefore, because "the land at issue reflects the character of defendants, [and] not plaintiffs[,]" the defendants are adamant that this factor, too, militates against the granting of injunctive relief in the form of ejectment. See *Id.*

Defendants also maintain that the land itself should not factor heavily in analyzing the ejectment issue because currently there are only "roughly 464 Cayuga citizens[,]" with approximately two-thirds of them living in New York. *Id.* at 73. The court fails to see, however, how this statistic undermines the importance of the subject land to the Cayugas. This is a common weakness in the defendants' analysis of the nature of the interest at stake. The defendants have done nothing more than cobble together bits and pieces of evidence which they claim shows how this first Restatement factor "weighs in [their] favor [.]" Def. Memo. at 33. As with the population statistic, however, the defendants do not explain how much of this evidence supports that conclusion.

Nonetheless, the court concludes that the subject land is not so "absolutely fundamental and paramount" to the Cayugas so as to justify ejectment of the current landowners. See Pl. Memo. at 32. The proof adduced during the hearing convinces the court that the loss of their homeland has had an immeasurable impact upon the Cayuga culture and Cayuga society as a whole, and,

to be sure, "[r]eturn of th[at] homeland w[ould] provide a vindication that the Cayugas [believe they] have been entitled to for generations." Pl. Memo. at 36. That vindication cannot come at the expense of the current landowners-landowners who, for the most part, are blameless and who, especially recently, have been treated as pawns by both the State and federal governments. Indeed, in the court's opinion, the laudable goals which the Cayugas hope to achieve through reclaiming their homeland could be accomplished without ejectment. As the court envisions it, eventually the Cayugas will have the financial means to purchase land within the claim area from willing sellers. When that is done the Cayugas will once again have a homeland where their culture can thrive, limited only by their ingenuity.

B. Relative Adequacy of Injunctive and Other Remedies

The second Restatement factor which the court must consider is "the relative adequacy of injunctive and other remedies available" to the Cayugas. Restatement§ 936(1)(b). This factor is "important" but as previously explained, as with each of these Restatement factors, the adequacy of remedies "is not the sole factor." *Id.* § 933, cmt. a (citation omitted). Ultimately, in determining the relative adequacy of various remedies, the question "is a practical one: whether the employment of that remedy would produce results found by the court to be as satisfactory to the plaintiffs as those he could properly derive from an injunction." *Id.*, Div. 13, Chap. 48, Topic 2. When that question is posed in this case, the answer is a resounding "Yes." As will be more fully explained below, monetary damages will produce results which are as satisfactory

to the Cayugas as those which they could properly derive from ejectment.

Reiterating their earlier argument that "the only remedy available in Indian Treaty cases" is ejectment, the Cayugas add that monetary damages alone are an insufficient remedy because of the cultural significance at least two portions of the claim area have to them. Pl. Memo. at 37 (emphasis in original). Those two areas are the Great Gulley, which one witness described as the equivalent of the Cayugas' "Eden," and the Cayuga Castle, which another witness described as akin to a capital. See Tr. I at 61 and 159. Then, in an attempt to mitigate what can only be described as the harsh remedy of ejectment, the Cayugas suggest that rather than immediate and outright ejectment of the current landowners, the court could order that title be restored to the Cayugas, or held in trust for them by the United States, with the court also ordering the current landowners to enter into long-term leases with the Cayugas.

Once again the defendants are taking the position that because the Cayugas do not have a "special relationship to the specific land at issue[,]" it is immaterial where a land base is situated and how it is acquired (i.e.ejectment, lease, purchase). Def. Memo. at 42. So long as the Cayugas have some land base, however acquired, the "same positive impacts" will result, such as economic development and restoration of a cohesive Cayuga society. *Id.* Hence the defendants strongly believe that there are adequate means available to compensate the Cayugas, apart from the drastic remedy of ejectment.

The long-term leases which the Cayugas are now suggesting as an alternative to ejectment do not alter

the defendants' position that ejectment is not an appropriate remedy. Long-term leases do not somehow make the concept of "ejectment" more palatable because even if the court does not order ejectment, and there is an attempt to negotiate such leases, the defendants hypothesize that the Cayugas would have the majority if not all of the bargaining power. The irony of this scenario is not lost on this court.

Insofar as the relative adequacies of various remedies are concerned, the defendants easily have the stronger argument. The Cayugas still have not managed to convince this court that ejectment is the only available relief in this case. Apart from the relatively few acres which comprise the Great Gully and Cayuga Castle, the Cayugas have not shown how the subject property is so unique such that the objectives which they hope to attain, such as economic, political and cultural development, cannot be reached without ejecting thousands upon thousands of landowners. It is certainly true, as Justice Black observed in his dissent in *Federal Power Com'n* v. *Tuscarora Indian Nation*, 362 U.S. 99, 142, 80 S. Ct. 543, 567, 4 L.Ed.2d 584 (1960), that "some things are worth more than money[.]"[21] The fact remains, however, that in this particular case ejectment is not an adequate remedy relative to other available remedies, most notably monetary damages. SeeRestatement § 937, cmt. b ("For property rights . . . , a damage award may often provide adequate substitutional relief."). By using monetary damages to purchase property from willing sellers, the Cayugas should have no difficulty accomplishing the same goals

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[21] Justice Black made this comment in response to the majority's holding that the New York Power Authority was entitled to flood certain lands owned by the Tuscarora Indians.

which they hope to accomplish through ejectment. In sum, because monetary damages are "as efficient [if not more so] to the ends of justice" than ejectment, comparatively speaking, ejectment is not an adequate remedy here. See Restatement § 933, cmt. a.

C. Unreasonable Delay

The third Restatement factor which the court must consider is laches, "the two essential elements of [which] are unreasonable delay committed by the plaintiff and prejudicial consequences suffered by the defendant." Restatement § 939, cmt. a (emphasis added)." The reasonableness of the delay is tested by asking what should have been expected of one in the plaintiff's position as the menace to his interests from the defendant's conduct developed." *Id.* § 939, cmt. b. Although "prompt action following reasonably explained delay may be especially necessary[,] . . . protests, complaints and negotiations looking toward a settlement of the controversy, go far to explain the reasonableness of the delay." *Id.*

At first glance a finding that the Cayugas unreasonably delayed in bringing this action seems inevitable. The disputed treaties were entered into in 1795 and 1807 and the Cayugas did not commence this lawsuit until nearly two hundred years later, in 1980; and the United States did not intervene on the Cayugas' behalf until 1982. This delay is not completely unreasonable, however, when the court takes into account the efforts to reclaim their homeland which the Cayugas have made over the years. In some ways, as the record reflects, the Cayugas' efforts to pursue this land claim earlier were, as with the initial treaty process, severely hampered by two factors: (1) their relative lack of sophistication in dealing with

governments and a legal system which were alien to them; and (2) the fact that the very systems which theoretically should have assisted the Cayugas seemingly thwarted their efforts.

By way of illustration, one reason for the Cayugas' delay, as this court has previously recognized, is that they could not pursue these claims through other vehicles such as the Indian Claims Commission ("ICC"). See *Cayuga Indian Nation of New York* v. *Cuomo*, 667 F.Supp. 938, 946 (N.D.N.Y. 1987). Furthermore arguably the Cayugas' land claims were not cognizable "until the Passamaquoddy Tribe filed a lawsuit against the State of Maine in 1972, and the theory was sustained by the First Circuit." Pl. Memo. at 41 (citations omitted). Shortly thereafter the Cayugas attempted to settle this matter, but they were unable to obtain Congressional approval, thus resorting to this federal litigation in 1980. In addition to attempting to pursue their land claims through various means over the years, the Cayugas stress that they are not to blame for any unreasonable delay; the blame for such delay lies largely with the State of New York. See Pl. Memo., and exhs. 9 and 10 thereto.

Regardless of whether the focus is on the timing of this lawsuit generally or the timing of the specific request for ejectment, the defendants strenuously argue that the delay factor augurs against ejectment. Although not couched in precisely these terms, the defendants appear to be making the overly simplistic argument that because at the time both the Cayugas and the United States were aware of the 1795 and 1807 treaties, the fact that they both waited almost two hundred years to commence this lawsuit is inexcusable.

Then, as do the Cayugas, the defendants rely upon selected snippets of historical evidence which they believe conclusively demonstrate that this lawsuit could easily have been commenced long before 1980. For example, defendants assert that in 1790 then President George Washington told the Senecas that they should bring their complaints regarding treaties to the federal courts. Def. Memo. at 44 (citation omitted). Even assuming that the court agrees (which it does not) with defendants' interpretation of the cited passage from Helen M. Upton's book, The Everett Report in Historical Perspective, it does not agree with the further contention that "[i]t is reasonable to believe that Washington's advice would have been communicated to . . . the Cayugas." *Id.* In making this statement, the defendants appear to have forgotten that the world in 1790 was a far different place than it is today, including in terms of modes of communication. In the court's opinion just the opposite seems more likely; it is reasonable to believe that Washington's "advice" was not communicated to the Cayugas.

Regardless of when the Cayugas should have or could have commenced this lawsuit, the court cannot overlook the prejudicial consequences which the defendants would sustain if the court were to order ejectment. Understandably, over the past two hundred years or so many of these defendants have improved the subject property in countless ways. The Cayugas do not address this prejudice factor-a factor which is far too important to ignore. The record is replete with instances where defendants (and their forebears) have vastly improved the subject property. Today the claim area contains all of the necessities of modern-day life-sewer, water and transportation systems, to name a

few. It is safe to say that the subject property today bears almost no resemblance to the undeveloped state of that property in the 1790's. It is also safe to say that this complete transformation is directly attributable to these defendants and their forebears. Thus, even though some delay on the part of the Cayugas is explainable, in the context of determining whether ejectment is an appropriate remedy, given this prejudice, the delay factor tips decidedly in favor of the defendants.

D. Related Misconduct

In examining whether the Cayugas engaged in "related misconduct" which might warrant denial of injunctive relief in the form of ejectment, the court must look to their "misconduct prior to or pending suit[.]" Restatement § 940, cmt. b. "[I]f the misconduct relates directly to the controversy immediately involved in the . . . suit and is of a character that renders the plaintiff's interests undeserving of injunctive protection[,]" then such relief may be denied. *Id.* However, "[c]ollateral misdeeds, no matter how indicative of general unworthiness, are not . . . material." *Id.*, cmt. c.

The thrust of the Cayugas' argument on this point is that they have not engaged in any misconduct which might preclude ejectment, whereas the defendants (aside from the State of New York), "have unclean hands" because, as evidenced in part by the testimony of the President and CEO of the National Bank of Geneva ("the Bank"), Thomas Kime, these defendants have ignored the lis pendens which was filed in conjunction with this lawsuit. Pl. Memo. at 42. The Cayugas highlight the admission by Mr. Kime that even after the filing of this lawsuit, the Bank continues to

make loans with respect to the subject property, fully aware of the pendency of this action. See Transcript (Sept. 18, 1998) at 544-48.

*27 New York also has unclean hands, argue the Cayugas, because it was aware as early as June 16, 1795, that the Cayugas' interest in land reserved to them could not be extinguished except by treaty entered into under the authority of the United States and consistent with the laws of Congress. See Pl. exh. 3 at 1 (June 16, 1795 Opinion, Attorney General Wm. Bradford's with Letter of Transmittal to Secretary of War). The Cayugas strenuously contend that the "Everett Report," which in essence outlines the history of New York's Indian "problem," reveals more recent evidence of New York's "unclean hands." See Pl. exh. 9 at xi and 10.

The defendants respond by again stressing the supposed delay on the part of the Cayugas in commencing this action. Further, the defendants suggest that the Cayugas's acceptance of $70,000.00[22] "for the sale of the claim area" from the federal government in the late 1970's constitutes a "waive[r][of] their right to continue their claims." Def. Memo. at 50. However, according to the defendants, the United States is responsible for the "most egregious" misconduct because it "did not-though it could have on many occasions-alter the parties' collision course, which resulted in this lawsuit." *Id.* at 48.

Examining the record as a whole leaves the court with the distinct impression that aside from the previously addressed issue of delay, any "related miscon-

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[22] Incredibly, the defendants assert that this $70,000.00 constitutes "substantial compensation." See Def. Memo. at 50.

duct" worthy of consideration here is that which is attributable to the State and federal governments. Clearly those two entities, at various times and to varying degrees, hindered the Cayugas' ability to reclaim their homeland. Thus, as the foregoing demonstrates, there is no "related misconduct" on the part of the Cayugas which would "render[] the[ir] . . . interests undeserving of injunctive protection[]" in the form of an ejectment order. See Restatement § 940. cmt. b.

E. Relative Hardship

Even "[w]hen a plaintiff proves that a tort has been committed or is threatened and shows that other remedies will not make him whole, an injunction is not to be issued as a matter of course. Restatement § 941, cmt. a. "Elementary justice requires consideration of the hardship the defendant would be caused by an injunction as compared with the hardship of the plaintiff would suffer if the injunction should be refused." *Id.* Relative hardship to the parties cannot, however, be viewed in isolation; it extends to other factors "such as the character of the conduct (including the respective motives) of the defendant and the plaintiff that produced the situation and created the attendant hardships." *Id.* In terms of the parties' respective motives, "[t]he defendants' good or bad faith is often important in an appraisal of his responsibility." *Id.* cmt. b. Likewise, "[t]he interests of third parties and of the public in general are also relevant here." *Id.* cmt. a (citation omitted).

Indisputably great hardships have befallen the Cayugas as a result of the 1795 and 1807 cessions; and the Cayugas will continue to sustain some hardships if the court refuses to order ejectment. The court must

balance those competing hardships, however, against those which would result from ejectment. Balancing the relative hardships in the present case, the court finds that ejectment would potentially displace literally thousands of private landowners and several public landowners, including those who provide such essential services as electricity and transportation systems.[23] Moreover, an order of ejectment would prove all too vividly the old axiom: "Two wrongs don't make a right." In sum, although the court is painfully aware of past hardships to the Cayugas, concentrating, as the court must, upon future hardships to the defendants which would result from ejectment, the court finds that this factor too unquestionably tips in defendants' favor.

F. Interests of Third Persons and the Public

In accordance with the Restatement, "public interest of the local community and the interests of the public in various social policies, must often be balanced against other factors" in determining "the appropriateness of injunction against tort." Restatement § 942, cmt. a. The nature of these interests are many, and "[t]he weight to be assigned to any one of the[m] . . . in a given situation depends upon its own individual significance, upon the extent to which it probably will be affected and upon its alignment with the other factors in the case." *Id.*

The Cayugas collapse the last two Restatement factors-the interest of third persons and the public and the practicability of framing and enforcing the

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[23] The Court does not doubt the sincerity of the Cayugas in wanting to enter into long-term leases with current landowners, but as the court has made clear, the issue at this juncture is ejectment-not leases.

injunction-into one. Again operating under the mistaken assumption that long-term leases would be a natural offshoot of an ejectment order, the Cayugas rely solely upon the testimony of Assistant Secretary of the Department of the Interior for Indian Affairs, Kevin Gover, to establish that such leases would be workable. Based upon a number of factors, such as the Cayugas' stated desire to enter into such leases; the Bureau of Indian Affairs' commonplace approval of leases in other contexts; the fact that easements and right-of-ways through reservations are routinely granted with respect to utilities and the like; and his understanding of the leases at issue in *Fluent* v. *Salamanca Indian Lease Authority*, 928 F.2d 542 (2d Cir. 1991), Mr. Gover opined that "it is practicable to grant ejectment."[24] Transcript (Sept. 17, 1998) ("Tr.II") at 277. Assistant Secretary Gover's opinion is, in a word, non-responsive. As should be abundantly clear by now, the court and the Cayugas are coming from two entirely different perspectives when it comes to the issue of ejectment. At the risk of sounding repetitive, the court is concerned with the ramifications of ejectment-not of long-term leases.

In terms of how the interests of third persons and the public would be impacted by an ejectment order, it takes little imagination to realize, as the record amply demonstrates, that the impact of ejectment would be

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[24] In addition, the Cayugas claim that Gover testified that an ejectment order along the lines of that ordered in Salamanca"is feasible and that his office would administer it on behalf of the Cayugas." Pl. Memo. at 48 (citing Tr.II at 273-274). The court and the Cayugas must be looking at two different transcripts. There is not even a hint of such testimony on the transcript pages to which the Cayugas cite.

widespread and harsh. In reaching this conclusion, the court almost completely discounts the testimony of Mr. Gover-not for lack of veracity;[25] but rather, through no fault of his own, Gover was asked to give an opinion which arguably he was not qualified to give; and, as previously alluded to, was based on facts which were of questionable relevancy.

On the other hand, the defendants' evidence on this factor is directly germane. Cayuga County's Director of Planning, Robert Brower, testified fairly extensively about the effect which ejectment would have on the area's transportation systems. He testified to the disruption which ejectment would cause to those systems, with resultant negative consequences for the economy. Bank President Kime echoed the negative economic impact of ejectment. The local banking industry would, in his opinion, be especially hard-hit in terms of the mortgage defaults which are bound to occur if this court orders ejectment. Given the extraordinarily unique circumstances of this litigation, and the public interest and social policy concerns which would be implicated if ejectment is ordered, the interests of third persons and the public heavily favor the defendants.

G. Practicability of Framing and Enforcing the Injunction

"If drafting and enforcing [of injunctive relief] are found to be impracticable, the injunction should not be granted." Restatement § 943, cmt. a. Not only must the court "delineate with reasonable precision the action that is to be prohibited or required, [but it] must

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[25] Indeed, the court found Mr. Gover, along with all of the other witnesses who testified during the evidentiary hearing, to be both candid and sincere.

envisage the practicability of enforcement measures if the defendant should refuse to comply." *Id.* The court should also be cognizant of the fact that "[a]n ineffective order or judgment may impair the prestige of the court, may render futile the relief that the order or judgment purports to award . . . and may give rise to vexatious disputes in contempt proceedings." *Id.* "This is not to say, however, that the difficulties of drafting and of administration thus presented are sufficient in themselves to outweigh the plaintiff's needs." *Id.* Injunctive relief should be withheld "only when the court's best efforts, in the light of the circumstances of the case in hand[ ] would probably result in impracticability[.]" *Id.*

This court has no difficulty in finding that it would be impractical if not completely impossible to frame and enforce an ejectment order here. That is so even if long-term leases were a component of such an order. There is a very real possibility that if ejectment is ordered, many if not all of the defendants would refuse to comply with such an order. The court is not suggesting in any way that under ordinary circumstances these defendants are not law-abiding citizens. An ejectment order would, however, strike at the very heart of what many in this country (including no doubt the individual landowner defendants), strive for years to achieve-ownership of real property.

No matter how hard it tries, the court simply cannot envisage a practical method of enforcing an ejectment order if, as the court strongly suspects, many defendants would refuse to comply with the same. The possibility of such en masse non-compliance could render futile an ejectment order and chaos could prevail. Furthermore, there is also a very real likelihood of vexatious disputes in the form of satellite contempt

proceedings-proceedings which could easily clog the federal courts well into the next century.

The court stresses that it is not denying ejectment on the basis of possible non-compliance with such an order. The basis for denial is a comparative analysis of the seven Restatement factors, which mandates the conclusion that ejectment, to put it mildly, is not an appropriate remedy in this case. Only one of those seven factors-related misconduct-favors the Cayugas. More importantly, however, is the overwhelming evidence showing that the cumulative effect of the Restatement factors would be devastating if this court were to order ejectment. Ejecting all or nearly all of the current landowners would result in widespread disruption not only to the Counties and those residing therein, but to the State of New York as a whole. That is so because, as the record shows, ejectment would mean that transportation systems, such as the New York State Thruway, would have to be rerouted at great expense. Putting aside costs, rerouting the Thruway would have almost unthinkable consequences in terms of intrastate and interstate commerce.

Similarly, ejectment would cause great upheaval in terms of requiring removal of existing power and sewer infrastructures. Not only that, conceivably ejectment would render homeless thousands upon thousands of innocent landowners. Ejectment would also destroy many revenue sources, such as tourism and agribusiness. While the court is sympathetic to the Cayugas' desire to reclaim their homeland and revitalize their culture, the court cannot turn back the clock. Surely the Cayugas are entitled to relief for the past two centuries during which they have been

deprived of their homeland; but ejectment is not the answer.

Conclusion

To summarize, the court finds that the State of New York's Eleventh Amendment immunity is not compromised given the presence of the United States as a plaintiff-intervenor in this action. Therefore, the court hereby denies the State's motion to dismiss the Cayugas' claims as against the State agencies. By the same token, as set forth herein, to the extent that there is proof at the upcoming trial on damages that the Cayugas are raising new claims or issues, the Eleventh Amendment may be implicated.

The court grants the defendants' motion in limine seeking to preclude ejectment as a remedy. In light of this holding, because that is the only relief which the Cayugas are seeking against the individual State defendants, the court hereby dismisses the Cayugas' and the United States' claims against those particular defendants.

IT IS SO ORDERED.

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHER DISTRICT OF NEW YORK.

Nos. 80-CV-930, 80-CV-960

THE CAYUGA INDIAN NATION OF NEW YORK, ET AL.,
PLAINTIFFS
AND
THE SENECA-CAYUGA TRIBE OF OKLAHOMA,
PLAINTIFF-INTERVENOR

v.

MARIO M. CUOMO, ET AL., DEFENDANTS

Aug. 13, 1991

MEMORANDUM-DECISION AND ORDER

McCURN, Chief Judge.

BACKGROUND

This action was commenced in November, 1980 by the Cayuga Indian Nation of New York. On November 9, 1981, this court granted the motion brought by the Seneca-Cayuga Tribe of Oklahoma to intervene in this action. The plaintiffs (or the "Cayugas") seek a declaration from this court concerning their current ownership of and right to possess a tract of land in central New York State containing approximately 64,000 acres ("the subject land"), an award of fair rental value for the

almost two hundred years during which they have been out of possession of the subject land, and other monetary and protective relief. This court already has issued several decisions concerning the present action. In *Cayuga Indian Nation of New York, et al. v. Cuomo, et al.*, 565 F. Supp. 1297 (N.D.N.Y. 1983) ("*Cayuga I*"), this court denied the defendants' motion to dismiss plaintiffs' complaint, and held that the plaintiffs can present evidence in support of their claims. *Cayuga I*, 565 F. Supp. at 1330. In *Cayuga Indian Nation of New York, et al. v. Cuomo, et al.*, 667 F. Supp. 938 (N.D.N.Y. 1987) ("*Cayuga II*"), this court denied both parties' motions for summary judgment on plaintiffs' claims. *Cayuga II*, 667 F. Supp. at 949. In *Cayuga Indian Nation of New York, et al. v. Cuomo, et al.*, 730 F. Supp. 485 (N.D.N.Y. 1990) ("*Cayuga III*"), the court granted the plaintiffs' motion for partial summary judgment, and held that agreements entered into in the years 1795 and 1807 between the plaintiffs and New York State, wherein the plaintiffs purportedly conveyed to the State of New York the plaintiffs' interest in the subject land, were invalid. *Cayuga III*, 730 F. Supp. at 493. In *Cayuga Indian Nation of New York, et al. v. Cuomo, et al.*, 758 F. Supp. 107 (N.D.N.Y.1991) ("*Cayuga IV*"), this court determined that the Cayugas obtained recognized title in the subject land by way of the 1794 Treaty of Canandaigua, and that therefore the defendants' defense of abandonment was legally insufficient to defeat plaintiffs' claims. *Cayuga IV*, 758 F. Supp. at 118. Most recently, the court, in *Cayuga Indian Nation of New York, et al. v. Cuomo, et al.*, 762 F. Supp. 30 (N.D.N.Y.1991) ("*Cayuga V*"), granted the motion to dismiss plaintiffs' complaint brought by defendant

Consolidated Rail Corporation ("Conrail") as against that defendant.[1]

By the present motion, the plaintiffs seek an order from this court declaring that the defendants are liable to the plaintiffs, and that any and all defenses of the defendants, including their affirmative defense of laches, are insufficient as a matter of law to avoid liability on plaintiffs' claims. The defendants argue that the present action is barred by the equitable doctrine of laches.

DISCUSSION

In support of their contention that the plaintiffs' action is barred by laches, the defendants initially argue that no federal statute specifically provides a time limitation concerning the Cayugas' claims. They allege that proof of the plaintiffs' attempts to enforce the "treaties" entered into between the Cayugas and the State of New York in 1795 and 1807 lends additional support to their position that this action is time-barred. They further argue that the education of the Cayugas, coupled with their proven ability to enforce their legal rights, demonstrates that the plaintiffs should no longer be afforded a protected status by the government. Finally, they claim that it would be inequitable to find in favor of the plaintiffs in light of the generations of

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[1] The court held that the Regional Rail Reorganization Act, 45 U.S.C. § § 701-797, established a Special Court which had original, exclusive and sole jurisdiction to hear and determine the claims brought by the plaintiffs which challenged Conrail's legal title to certain rail lines transferred to Conrail pursuant to the Rail Act and which were the subject of the present dispute. Accordingly, this court was without jurisdiction to hear plaintiffs' claims against Conrail. *Cayuga V*, 762 F. Supp. at 35-36.

individuals who have lived on the subject land since the purported conveyance of such land to the State of New York.[2]

The Cayugas claim that "this case was timely filed within the express statutory and regulatory framework established by Congress in 1982 to govern Indian land claims. *See* 2[8] U.S.C. § 2415; 48 Fed. Reg. 13698, 13920 (March 31, 1983)."[3] They argue that the language of 28 U.S.C. § 2415, the holding of the Supreme Court in *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985), *reh'g denied* 471 U.S. 1062, 105 S. Ct. 2173, 85 L.Ed.2d 491 (1985) ("*County of Oneida*"), as well as the second circuit's decision in *Oneida Indian Nation of New York v. Oneida County*, 719 F.2d 525 (2d Cir. 1983) ("*Oneida Indian Nation of New York II*") all support

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[2] At oral argument, Assistant Attorney General David B. Roberts raised, for the first time, the State's argument that it was immune from plaintiffs' action under the eleventh amendment of the United States Constitution. The State argued that the Supreme Court's recent decision in *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 111 S.Ct. 2578, 115 L.Ed.2d 686, (1991) stands for the proposition that the State of New York, as sovereign, is immune from the instant action. Because the *Blatchford* decision was so recent, at the time oral argument was heard concerning the present motions, none of the parties had had the opportunity to submit any briefs to this court regarding the applicability, or lack thereof, of the *Blatchford* decision with respect to the present action. By letter dated July 23, 1991, the court invited the State to bring a formal motion concerning the issue of sovereign immunity before this court, thereby affording the parties the opportunity to fully present their respective arguments concerning the import of the *Blatchford* decision to this action.

[3] Plaintiffs' memorandum in support of their motion for summary judgment ("Pl.Mem.") at 3.

their contention that the defense of laches is unavailable in Indian land claim cases.[4] Additionally, they contend that Justice Stevens' dissent in *County of Oneida*, as well as Judge Newman's statement in *Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145 (2d Cir.1988) ("*Oneida Indian Nation of New York III*"), lend further credence to their argument that laches is not a legally sufficient defense to their claims. Accordingly, a review of 28 U.S.C. § 2415, its legislative history, and the various decisions relied upon by both parties in support of their respective positions is in order.

28 U.S.C. § 2415(c) provides that there is no time limitation on claims which seek "to establish the title to, or right of possession of, real or personal property." Sections 2415(a) and (b) of this Title provide that actions brought by the United States on behalf of an Indian tribe which sounded in contract or tort, sought money damages, and accrued prior to July, 1966 were timely so long as such actions were commenced prior to December 31, 1982. *See, e.g., Oneida Indian Nation of New York II*, 719 F.2d at 538. The 1982 amendments to this statute also imposed a specific statute of limitations concerning certain tort and contract claims brought by Indian tribes themselves. *County of Oneida*, 470 U.S. at 242-43, 105 S. Ct. at 1256, 84 L.Ed.2d 169.

In *Oneida Indian Nation of New York II*, the second circuit was confronted by a land claim brought by the Oneida Indian Nation of New York, the Oneida Indian Nation of Wisconsin and the Oneida of the Thames Band Council (collectively referred to as the "Oneidas"). There, as here, the court was confronted by the argu-

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[4] Plaintiffs' Reply Memorandum ("Pl.Reply") at 3-4, 7-10.

ment that the claims of the Indian tribes were time-barred because the Oneidas' lawsuit was filed some 175 years after their cause of action had accrued. In finding this argument to be without merit, the court, in discussing the *minimum* amount of time which Indian tribes are to be afforded in the filing of land claims, concluded that:

> "[A]t the very least, suits by tribes should be held timely if such suits would have been timely if brought by the United States." (quoting *Oneida Indian Nation of New York v. New York*, 691 F.2d 1070, 1084 (2d Cir.1982) ("*Oneida Indian Nation of New York I*")).

Oneida Indian Nation of New York II, 719 F.2d at 538. Since the Oneidas' action would have been timely had the same been brought by the United States on the plaintiffs' behalf pursuant to 28 U.S.C. § 2415, the court concluded that the Oneidas' action was timely. *Id.* While the Oneidas were apparently both impoverished and illiterate, *see Oneida Indian Nation of New York v. County of Cayuga*, 434 F. Supp. 527, 535-37 (N.D.N.Y. 1977), the second circuit did not limit its holding to like Indian tribes. Nor did it claim, as the defendants would have this court hold, that its ruling was only applicable to non-litigious tribes, or tribes that did not seek to enforce their perceived right to compensation under their "treaties" with the State. In fact, to view the second circuit's ruling in *Oneida Indian Nation of New York II* to stand for this proposition would be, in this court's opinion, clearly erroneous. Under 28 U.S.C. § 2415, the United States was entitled to bring an action seeking money damages on behalf of any Indian tribe until December 31, 1982, notwithstanding such tribe's education, literacy or litigiousness. *Id.* As the

second circuit noted, "[i]t would be anomalous to allow the trustee to sue under more favorable conditions tha[n] those afforded the tribes themselves." *Oneida Indian Nation of New York II*, 719 F.2d at 538 (quoting *Oneida Indian Nation of New York I*, 691 F.2d at 1083-84).

This court holds that the second circuit's decision in *Oneida Indian Nation of New York II* stands for the proposition that claims brought by Indian tribes in general, including the plaintiffs herein, should be held by courts to be timely, and therefore not barred by laches, if, at the very least, such a suit would have been timely if the same had been brought by the United States.[5]

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[5] The court notes that the mere fact that the Cayugas may have attempted to obtain additional compensation under the 1795 and 1807 "treaties" between these two parties did not, by itself, make these agreements legally enforceable treaties. As this court has already held, the United States, and the United States alone, has the legal power to consent to the alienation of tribal land. *See Cayuga III*, 730 F. Supp. at 488 (citing 25 U.S.C. § 177). The federal government never consented to the Cayugas' attempt to convey the subject land to New York in 1795 and 1807. *Id.* at 493. Any actions of the Cayugas to secure additional compensation pursuant to these invalid agreements did not magically transmogrify such invalid agreements into valid treaties which ceded rights in the subject land to the State of New York.

With respect to the defendants' contention that the Cayugas should not be afforded any protected status by this court, this court has already held that their exists an especial trust relationship between the plaintiffs herein and the federal government. *Cayuga II*, 667 F. Supp. at 943. Thus, the defendants' argument that the Cayugas are somehow not to be afforded any protected status at the present time is contrary to the law of this case and clearly lacks substance.

The Supreme Court, in affirming in part and reversing in part the second circuit's holding in *Oneida Indian Nation of New York II*, discussed, *inter alia*, the legislative history surrounding 28 U.S.C. § 2415. In *County of Oneida*, the Supreme Court held that:

> The legislative history of the 1972, 1977, and 1980 amendments [to 28 U.S.C. § 2415] demonstrates that Congress did not intend § 2415 to apply to suits brought by the Indians themselves, and that it assumed that the Indians' right to sue was not otherwise subject to any statute of limitations. . . .
>
> With the enactment of the 1982 amendments, Congress for the first time imposed a statute of limitations on certain tort and contract claims for damages brought by Indian tribes. These amendments, enacted as the Indian Claims Limitation Act of 1982, Pub.L. 97-394, 96 Stat. 1976, note following 28 U.S.C. § 2415, established a system for the final resolution of pre-1966 claims cognizable under §§ 2415(a) and (b). The Act directed the Secretary of the Interior to compile and publish in the Federal Register a list of all Indian claims to which the statute of limitations provided in 28 U.S.C. § 2415 applied. The Act also directed that the Secretary notify those Indians who may have an interest in such claims. The Indians were then given an opportunity to submit additional claims; these were to be compiled and published on a second list. . . . If at any time the Secretary decides not to pursue a claim on one of the lists, "*any* right of action shall be barred unless the complaint is filed within one year after the date of publication [of the notice of the Secretary's decision] in the Federal Register."

> Pub.L. 97-394, 96 Stat.1978 § 5(c) (emphasis added). Thus, § 5(c) implicitly imposed a 1-year statute of limitations within which the Indians must bring contract and tort claims that are covered by §§ 2415(a) and (b) and not listed by the Secretary. *So long as a listed claim is neither acted upon nor formally rejected by the Secretary, it remains live.*

County of Oneida at 242-43, 105 S. Ct. at 1255-56, 84 L.Ed.2d 169 (footnote omitted) (emphasis added).[6]

While the Supreme Court found that the time limits provided in § § 2415(a) and (b) apply only to actions brought by the United States, and not to those lawsuits commenced by Indian tribes themselves, *see id.* at 242, 105 S. Ct. at 1255-56, 84 L.Ed.2d 169, the second circuit's determination that the time limitation provided by this statute is the *minimum* amount of time which must be afforded to Indian tribes which bring land claim actions on their own behalf is still the law in this circuit. A fair reading of *Oneida Indian Nation of New York II* reveals that actions brought by Indian tribes may well be timely even *after* the time period available to the United States to bring such claims has passed pursuant to Section 2415; for that court's holding provides that, *at the very least*, suits brought by tribes are to be held timely if such suits would have been timely if such actions were brought by the United States. *Oneida Indian Nation of New York II*, 719 F.2d at 538.

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[6] At oral argument, both parties conceded that the Secretary of the Interior listed the Cayuga land claim as a § 2415 claim. *See* 48 Fed.Reg. 13698, 13920 (March 31, 1983). The Secretary of the Interior has taken no further action regarding this claim subsequent his listing of the same in the Federal Register. Therefore, under *County of Oneida*, this claim remained live. *County of Oneida*, 470 U.S. at 243, 105 S. Ct. at 1256, 84 L.Ed.2d 169.

In fact, the vitality of this ruling was noted by Justice Stevens in his dissent in *County of Oneida*. Justice Stevens, joined by Chief Justice Berger, and Justices White and Rehnquist, recognized that "[t]he Court of Appeals' rejection of delay-based defenses, [discussed in] 719 F.2d [at 538] *will remain the law of the Circuit until it is reversed by this court, and will no doubt apply to the numerous Indian claims pending in the lower courts. . . .*" *Id.* at 261-62 n. 10, 105 S. Ct. at 1265-66 n. 10, 84 L.Ed.2d 169 (emphasis added). One such lower court claim is the instant action.

This lawsuit was commenced by the Cayuga Indian Nation of New York on November 19, 1980, with the plaintiff-intervenor Seneca-Cayuga Tribe of Oklahoma joining this action in November, 1981. The instant action would have been timely if it had been brought by the United States by December 31, 1982. *See Oneida Indian Nation of New York II*, 719 F.2d at 538. Thus, it is apparent that this lawsuit was timely when filed by the plaintiffs, and that the defense of laches is unavailable to the defendants herein.[7]

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[7] In *Oneida Indian Nation of New York III*, Judge Newman stated, "[t]he writer accepts the prior panel's rejection of a laches defense as the law of the case, though would find the issue to be a substantial one if it were open." *Oneida Indian Nation of New York III*, 860 F.2d at 1149 n. 1. The defendants argue that this comment demonstrates that laches is a viable defense to Indian land claim cases, and that the court's holding in *Oneida Indian Nation of New York II* is no longer the law in this circuit.

However, this court is unable to interpret Judge Newman's comment as standing for the proposition that the second circuit's holding in *Oneida Indian Nation of New York II* is no longer good law. As appealing as this argument might be, in particular consideration of the at least equitable property rights of generations of landholders who have relied upon their apparent good title, it is

The defendants also argue that:

> In the last 185 years, private and public landowners have settled, cultivated and developed the Subject Land without any legal challenge to their rights to the land. The Subject Land has substantially increased in value. Entire lifetimes of residence on this land have been invested. There have been literally generations of innocent purchasers of the property and like numbers of people abiding by the laws of the Federal and State governments, paying taxes and building a community on the subject land. If Plaintiff's claims are allowed to proceed, title to real estate in large portions of Cayuga and Seneca counties will be disrupted and landowners, who had no knowledge of the possible defect in their title at the time they purchased, will be irreparably harmed.[8]

However, as the second circuit stated in *Oneida Indian Nation of New York II*, "we know of no principle of law that would relate the availability of judicial relief to the gravity of the wrong sought to be addressed." *Oneida Indian Nation of New York II*, 719 F.2d at 539.

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for the second circuit or the Supreme Court to so rule, not this district court. As noted in 21 C.J.S. *Courts* § 187 (1940):

> In determining a case the court is not concerned with what the law ought to be, but its sole function is to declare what the law, applicable to the facts of the case, is. A fortiori courts will not depart from an established rule of law to meet a particular case of supposed hardship. The rule of stare decisis is peculiarly applicable to a trial court.

Id. (footnotes omitted).

[8] Defendants' memorandum in support of their motion for summary judgment at 20.

"Rather, the courts have in numerous contexts treated as justiciable claims that resulted in wide-ranging and 'disruptive' remedies." *Oneida Indian Nation of New York I*, 691 F.2d at 1083. This reasoning applies with equal force to the facts herein. The defendants' motion cannot be granted even though this court's ruling may eventually cause disruption in Cayuga and Seneca counties.

CONCLUSION

The law enunciated by the second circuit and the Supreme Court regarding the issue presently before this court is clear. The plaintiffs' action, which was commenced in November, 1980 was timely. *See Oneida Indian Nation of New York II*, 719 F.2d at 538; *County of Oneida*, 470 U.S. at 243, 105 S. Ct. at 1256, 84 L.Ed.2d 169. Thus, the defense of laches is unavailable to any of the defendants in the present action, including the State of New York. No other defense to plaintiffs' action has been raised by any of the other defendants herein, except the State of New York.[9] Accordingly, the plaintiffs' motion for partial summary judgment on the issue of liability is granted as to all defendants except the State of New York.

IT IS SO ORDERED.

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[9] As stated *supra* at n. 2, the State of New York now contends that some or all of plaintiffs' claims against the State are barred by the eleventh amendment. In light of this position, the court has invited the State to make a formal motion relating to this argument to be heard by this court on October 15, 1991 at 11 a.m. in Syracuse, New York.

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT NEW YORK.

Nos. 80-CV-930, 80-CV-960

THE CAYUGA INDIAN NATION OF NEW YORK, ET AL.,
PLAINTIFFS
AND
THE SENECA-CAYUGA TRIBE OF OKLAHOMA,
PLAINTIFF-INTERVENOR

v.

MARIO M. CUOMO, ET AL., DEFENDANTS

March 6, 1991

MEMORANDUM-DECISION AND ORDER

McCURN, Chief Judge.

The plaintiffs and the defendants have moved for summary judgment concerning the issue of whether defendants' legal defense of abandonment effectively precludes the plaintiffs from maintaining the instant action. The plaintiffs contend that abandonment is not a viable defense to this lawsuit, and that they can succeed in the present action even though they no longer live on the land at issue in this dispute. The defendants argue that the plaintiffs cannot prevail in this action because they allegedly abandoned the land which is the subject of plaintiffs' claims. For the reasons stated

below, this court grants the plaintiffs' motion for partial summary judgment and denies the defendants' motion.

Background

This is the fourth memorandum-decision and order issued by this court concerning the present action, and familiarity with the background of this case is presumed. *See Cayuga Indian Nation of New York et al. v. Cuomo et al.*, 565 F. Supp. 1297 (N.D.N.Y.1983) ("*Cayuga I*") *Cayuga Indian Nation of New York et al. v. Cuomo et al.*, 667 F. Supp. 938 (N.D.N.Y.1987) ("*Cayuga II*") and *Cayuga Indian Nation of New York et al. v. Cuomo et al.*, 730 F. Supp. 485 (N.D.N.Y.1990) ("*Cayuga III*"). However, a brief review of the facts concerning plaintiffs' claims is in order.

Plaintiff Cayuga Indian Nation of New York and plaintiff-intervenor Seneca-Cayuga Tribe of Oklahoma (collectively referred to as "the plaintiffs" or "the Cayugas") both seek a declaration from this court concerning their current ownership of and right to possess a tract of land in central New York State containing approximately 64,000 acres ("the subject land"), an award of fair rental value for the almost two hundred years during which they have been out of possession of the subject land, and other monetary and protective relief.[1]

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[1] Plaintiffs maintain that their members are the direct successors in interest to the Cayuga Nation of the Six Nation Iroquois Confederacy which, until the acts complained of in this suit, occupied the land at issue since time immemorial. *Cayuga I*, 565 F. Supp. at 1302. The Six Nations in this Confederacy were comprised of the Oneida, Tuscarora, Mohawk, Onondaga, Cayuga and Seneca Nations. *Id.* at 1303.

This court has previously held that the plaintiffs can present evidence in support of the above claims. *Cayuga I*, 565 F. Supp. at 1330. In *Cayuga II*, this court denied both parties' motions for summary judgment on plaintiffs' claims. *Id.*, 667 F. Supp. at 949. In *Cayuga III*, this court granted the plaintiffs' motion for partial summary judgment and held that agreements entered into in the years 1795 and 1807 between the plaintiffs and New York State, wherein the plaintiffs purportedly conveyed to the State of New York the plaintiffs' interest in the subject land, were invalid. *Id.*, 730 F. Supp. at 493.

By the instant motion, the plaintiffs seek an order from this court holding that the defendants' affirmative defense alleging abandonment is insufficient as a matter of law to preclude recovery on plaintiffs' claims. The defendants contend that this defense bars the plaintiffs from succeeding on their claims against defendants, and have therefore moved for summary judgment on plaintiffs' complaint.

Discussion

(1) The Cayugas' title concerning the subject land.

The first aspect of these motions which this court must consider in arriving at its decision relates to the form or type of title held by the plaintiffs regarding the subject land.

There are two distinct types of title to Indian land; "aboriginal" title and "recognized" or "reserved" title. An Indian tribe obtains aboriginal title in land when it continually uses and occupies said property to the exclusion of other Indian tribes or persons. Conversely, where Congress has, by treaty or statute, conferred upon an Indian tribe, or acknowledged to the Indians,

the right to permanently occupy and use certain land, an Indian tribe is said to possess recognized or reserved title in such land. *Bennett County v. United States*, 394 F.2d 8, 11 (8th Cir. 1968); *Miami Tribe of Oklahoma v. United States*, 175 F. Supp. 926, 936, 146 Ct. Cl. 421 (1959).

Differentiating between these two forms of title is critical in resolving the issues before this court. Since aboriginal title is dependent upon actual, continuous and exclusive possession of the land, proof of a tribe's voluntary abandonment of such property constitutes a defense to a subsequent claim concerning the land. *See e.g.* F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) at 492 and cases cited therein.[2] However, if an Indian tribe possesses recognized title in certain land, then Congress, and only Congress, may divest the tribe of its title to such land. *Cf. Solem v. Bartlett*, 465 U.S. 463, 470, 104 S. Ct. 1161, 1166, 79 L.Ed.2d 443 (1984), *reh'g denied* 466 U.S. 948, 104 S. Ct. 2148, 80 L.Ed.2d 535 (1984) ("only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire plot retains its reservation status until Congress explicitly indicates otherwise") (*citing United States v. Celestine*, 215 U.S. 278, 285, 30 S. Ct. 93, 94-95, 54 L.Ed.2d 195 (1909)); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587-88, 97 S. Ct. 1361, 1363-64, 51 L.Ed.2d 660 (1977); *De Coteau v. District County Ct. for Tenth Jud. Dist.*, 420 U.S. 425, 444, 95 S. Ct. 1082, 1092-93, 43

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[2] In fact, the plaintiffs concede that "[b]ecause aboriginal title is based upon continued use and occupancy of the land, aboriginal title can be voluntarily abandoned." *See* plaintiffs' memorandum in opposition to defendants' motion for summary judgment, p. 9.

L.Ed.2d 300 (1975), *reh'g denied* 421 U.S. 939, 95 S. Ct. 1667, 44 L.Ed.2d 95 (1975); *Mattz v. Arnett*, 412 U.S. 481, 504-05, 93 S. Ct. 2245, 2257-58, 37 L.Ed.2d 92 (1973); *see also* F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) at 493.

Central to the plaintiffs' argument that the defense of abandonment is insufficient as a matter of law with respect to their claims is their contention that the 1794 Treaty of Canandaigua ("the Treaty"), entered into between the federal government and the Six Nations, afforded the plaintiffs recognized title to the subject land.

This Treaty contained, *inter alia*, the following provisions:

> Article I
>
> Peace and friendship are hereby firmly established, and shall be perpetual, between the United States and the Six Nations.
>
> Article II
>
> The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

Article III

The land of the Seneka nation is bounded as follows: [Article III continues by describing in detail the boundaries of the Seneka nation's land, and concludes by stating:] Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneka nation; and the United States will never claim the same, nor disturb the Seneka nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

Article IV

The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof.

* * * * * *

In witness whereof, [Federal Treaty Commissioner] Timothy Pickering, and the sachems and war chiefs of the Six Nations, have hereto set their hands and seals.

> Done at Konondaigua, in the State of New York, the eleventh day of November, in the year one thousand seven hundred and ninety-four.

Following this provision, the signatures of approximately 60 individuals and 12 witnesses appear. *See* 7 Stat. 44.

The interpretation of the language contained in this, or any treaty, is a question of law for a court to decide. *See Sioux Tribe v. United States*, 500 F.2d 458, 462, 205 Ct.Cl. 148 (1974) ("[w]e have repeatedly held that the interpretation of an Indian treaty is a question of law, not a matter of fact") and cases cited therein; *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n. 2 (9th Cir.1986), *cert. denied* 479 U.S. 1009, 107 S. Ct. 650, 93 L.Ed.2d 705 (1986); *Strong v. United States*, 518 F.2d 556, 563, 207 Ct. Cl. 254 (1975), *cert. denied* 423 U.S. 1015, 96 S. Ct. 448, 46 L.Ed.2d 386 (1975). Therefore, this court must examine these provisions of the Treaty and determine whether it conferred recognized title on the plaintiffs.[3]

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[3] In analyzing the provisions of this Treaty, this court is mindful of the general rule courts must follow in interpreting Indian treaties. This axiom provides that "[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 174, 93 S. Ct. 1257, 1263, 36 L.Ed.2d 129 (1973) (*citing Carpenter v. Shaw*, 280 U.S. 363, 367, 50 S. Ct. 121, 122, 74 L.Ed. 478 (1930)). *See also Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631, 90 S. Ct. 1328, 1334, 25 L.Ed.2d 615 (1970), *reh'g denied* 398 U.S. 945, 90 S. Ct. 1834, 26 L.Ed.2d 285 (1970) ("treaties with the Indians must be interpreted as they would have understood them, and any doubtful expressions in them should be resolved in the Indians' favor") (citations omitted); F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) at 221-22.

(a) Did the Treaty confer recognized title to the Cayugas?

When determining whether a treaty or statute confers reserved title to an Indian tribe, courts must keep in mind that "formal statements of recognition are not necessary in order that a Treaty be deemed to have recognized title in a particular Tribe." *United States v. Kiowa, Comanche and Apache Tribes of Indians*, 479 F.2d 1369, 1374, 202 Ct. Cl. 29 (1973), *cert. denied sub nom.* 416 U.S. 936, 94 S. Ct. 1936, 40 L.Ed.2d 287 (1974). Such title "may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation." *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278-79, 75 S. Ct. 313, 317, 99 L.Ed. 314 (1955).

As the court of claims noted in *Strong:*

> Where Congress has by treaty or statute conferred upon the Indians or acknowledged in the Indians the right to *permanently* occupy and use land, then the Indians have a right or title to that land.

Id., 518 F.2d at 563 (emphasis in original), *quoting Miami Tribe, supra*, 175 F. Supp. at 936.

The plaintiffs contend that the plain, unambiguous language of the Treaty conferred recognized title upon the Cayugas. They point out that Article II of the Treaty explicitly provides that "[t]he United States *acknowledge the lands reserved to* the . . . *Cayuga Nations*, in their respective treaties with the state of New York, *and called their reservations*, to be their property." This Article concludes by noting that "the *said reservations shall remain theirs*, until they choose

to sell the same to the people of the United States, who have the right to purchase."

Article IV notes that, by this Treaty, the United States "*described and acknowledged what lands belong to the . . . Cayugas* " (emphasis supplied throughout).[4]

Despite the plain language contained in these two Articles, the defendants contend that this Treaty "simply acknowledged whatever aboriginal right of occupancy the Cayuga tribe may have had."[5] In support of this contention, the defendants rely primarily on *Andrews v. State of New York*, 192 Misc. 429, 79 N.Y.S.2d 479 (Ct. Cl. 1948), *aff'd* 276 A.D. 814, 93 N.Y.S.2d 705 (1949); *Seneca Nation of Indians v. United States*, 173 Ct. Cl. 917 (1965); *People ex rel. Ray v. Martin*, 294 N.Y. 61, 60 N.E.2d 541 (Ct. App. 1945) and *Williams v. Chicago*, 242 U.S. 434, 37 S. Ct. 142, 61 L.Ed. 414 (1917). However, defendants' reliance on these cases is misplaced.

In *Andrews*, New York's court of claims was confronted with a claim by an enrolled member of the Onondaga Indian Nation who, although she did not live on the reservation, argued that the State of New York had abridged certain rights she possessed in communal lands of said Nation. In commenting on the primary

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[4] *See* 7 Stat. 44. The treaty referred to in Article II concerning the State of New York was the 1789 treaty entered into between the plaintiffs and the State. By this treaty, the Cayugas relinquished approximately 3,000,000 acres in what is now central New York State to the State, reserving for their own use the 64,015 acres that is the subject of the present dispute. *Cayuga I*, 565 F. Supp. at 1303-04.

[5] Defendants' memorandum in opposition to plaintiffs' motion for partial summary judgment ("Def. Resp. Memo."), p. 3.

defect in the claimant's case, the court noted that Ms. Andrews:

> [S]ought to disregard completely the organization of which she claims to be a member. She has provided the Court with no statute which recognizes an obligation running from the State to any and every individual Indian belonging to the Indian Nation, nor has the claimant pointed to any treaty or any agreement where such an obligation was recognized or mentioned.

Id., 79 N.Y.S.2d at 488. In light of these facts, the court dismissed plaintiff's claim, concluding that:

> [I]n the absence of legislative action bestowing upon individual Indians the right to litigate internal questions relating to their tribal property in the Court of Claims, and conferring jurisdiction to determine such controversies, this Court should not assume jurisdiction.

Id. 79 N.Y.S.2d at 489.

However, prior to finding that it had no jurisdiction over plaintiff's claim, the court stated, in what was necessarily dicta, that the 1794 Treaty of Canandaigua "did not create the Onondaga Reservation, but confirmed the Onondaga's aboriginal right of possession." *Id.* 79 N.Y.S.2d at 482.

The defendants claim that this statement in *Andrews* necessarily precludes the plaintiffs from succeeding in the present action. Since the *Andrews* court found that the Treaty merely "confirmed the Onondaga's aboriginal right of possession" to the land, the defendants allege that the Cayugas, whose claim to recognized title is based on the same Article of the Treaty discussed in

Andrews, likewise only have an aboriginal right of possession in the subject land.

This is not the case.

The court's reference to the rights allegedly created by the Treaty in *Andrews* was mere dicta, since that court dismissed plaintiff's claim for lack of jurisdiction. A court is free to disregard a prior court's obiter dicta concerning an issue which is squarely in dispute in a subsequent action. *See, e.g., United States v. Crawley*, 837 F.2d 291, 292 (7th Cir.1988). An important factor weighing against a court's relying on dicta in reaching its own determination concerning such an issue is the fact that the prior court may not have considered the issue as fully as it would have had the issue been essential to the outcome of the prior case. *Id.* In matters involving treaties, the *Andrews* court itself recognized that a federal court's interpretation of a treaty is binding on state courts. *See id.*, 79 N.Y.S.2d at 484. This court believes that the *Andrews* court did not fully consider all of the relevant issues regarding the type of title conferred to the Indian tribes by the Treaty in its comments concerning the same, since that issue was neither essential nor relevant to the court's ultimate holding in that case. Therefore, this court is not constrained, nor is it persuaded by that court's interpretation of the Treaty of Canandaigua.

In *Seneca Nation of Indians, supra*, the U.S. Court of Claims stated that:

> [T]he purpose of [the Treaty] was to reconfirm peace and friendship between the United States and the Six Nations, to correct an inadvertent error in the boundaries theretofore allotted to the Indians, and to relinquish any rights the United

> States may have acquired through this error. There was no purpose to divest New York and Massachusetts of their rights, nor was there any purpose to prevent or supervise sales or transfers of Seneca territory.

Id., 173 Ct. Cl. at 922 n. 5.

However, the crux of the claims in *Seneca Nation of Indians* concerned disputes between the parties over the proper role of the federal government with respect to Indian tribes in light of the newly established fiduciary relationship between the Indians and the federal government created by the passage of the 1790 Trade and Intercourse Act. Prior to the Act's passage, the prevailing standard which courts had utilized in reviewing conveyances of Indian land for possible fraud or deceit had been the "just and honorable dealings" standard provided by the Indian Claims Commission Act. Subsequent to the Act's passage, however, the Court of Claims held that Indians were also protected against improvident, unfair or unconscionable conveyances of their land, *id.* at 925, and that therefore conveyances of Indian land subsequent to the passage of the Act had to be scrutinized in light of this heightened standard. *Id.* at 927.

Since that court's interpretation of the language of the Treaty concerning the Seneca Nation's lands was not necessary for its ultimate holding, its comments were dicta and therefore not binding on this court. Moreover, that case was concerned with the language contained in Article III of the Treaty, which dealt exclusively with the boundaries of the Seneca Nation's land and the rights afforded to the Seneca Nation regarding this land. There are significant differences

between that Article and Article II of the Treaty, which dealt with the Cayugas.

Article II acknowledges the lands "reserved to" the Cayuga Nation and "called their reservations." It continues by stating that these "reservations" shall remain theirs until they choose to sell the same to the people of the United States. Article III never acknowledges lands "reserved" to the Senecas, nor does it refer to the land of the Seneca Nation as a "reservation". As the plaintiffs point out, had the United States intended to deal with the Cayuga reservation and the Seneca lands in an identical manner, it would have used identical language and terminology when referring to these tribes in the Treaty. Its use of the words "reserved" and "reservation" with respect to the Cayuga reservation, and the complete absence of these words in *114 the Treaty's provisions concerning the Seneca lands, clearly indicates to this court that the United States dealt with these two tribes differently when it treated with them at Canandaigua.

In *Martin*, *supra*, a prisoner was challenging the validity of his conviction for murder and the life sentence imposed on him because of his crime. Ray alleged that the Supreme Court of the State of New York was without jurisdiction to hear the People's case against him because his offense was committed on an Indian reservation. After discussing at some length the federal and New York State governments' respective involvement with Indian tribes, the Court affirmed the conviction and sentencing of Ray. Before reaching this conclusion, the Court stated that the Treaty of Canandaigua "did not create any reservation but confirmed the Senecas' aboriginal right of possession." *Id.*, 294 N.Y. at 68, 60 N.E.2d at 544. The Court subsequently

noted that "the doubts and vagueness that becloud the general subject of law on Indian reservations, have nothing whatsoever to do with criminal prosecutions like that of this relator for the killing of Paul Balsiger . . . ." *Id.* at 73, 60 N.E.2d at 547.

As with the *Andrews* and *Seneca Nation of Indians* cases, the Court's statement in *Martin* regarding the rights created by the Treaty was not necessary for its ultimate finding, and was therefore dicta.[6] Additionally, *Martin* involved a jurisdictional dispute regarding a crime which occurred on the grounds of the Seneca Nation. As discussed *supra*, the Treaty of Canandaigua refers to and treats the Seneca lands in a manner different than that of the Cayuga reservation. While the Treaty may not have conferred recognized title on the Seneca Indians, such a finding would not be dispositive of the issue of whether the Treaty created recognized title for the plaintiffs herein.

Since the Court's comments in *Martin* regarding the rights conferred to the Seneca Nation by the Treaty were both dicta and based upon Article III, and not Article II, of the Treaty, this court finds *Martin* distinguishable from the present case.

Finally, in *Williams*, *supra*, several members of the Pokagon Band of Pottawatomie Indians commenced an action against the city of Chicago and numerous corporations occupying lands in Illinois. The complaint alleged that they and the other members of the Pottawatomie Nation of Indians were owners of certain lands in Illinois being occupied by the defendants. The plaintiffs alleged that the Treaty of Greenville, 7 Stat.

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[6] In fact, neither Ray nor his victim were members of the Seneca Nation.

49, had conferred what is now called recognized title to the Pottawatomie Nation, and accordingly sought an injunction ordering the defendants out of the lands, as well as reasonable compensation for their use of the property at issue.

In affirming the dismissal of plaintiffs' claims, the Supreme Court noted that the Treaty of Greenville:

> [D]id not convey a fee-simple title to the Indians; that under it no tribe could claim more than the right of continued occupancy; and that when it was abandoned, all legal right or interest which both tribe and its members had in the territory came to an end.

Id., 242 U.S. at 437-38, 37 S. Ct. at 144.

The defendants contend that "the facts before the Supreme Court in *Williams* are strikingly similar to those before this Court" in that:

> In each treaty, the federal government acknowledged that the signatory tribes had a continued right to use and occupy certain land; neither treaty conveyed fee-simple title to the signatory tribes.[7]

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[7] Defendants' Reply Memorandum, p. 4. The court notes that in his sixth affidavit submitted to this court, Dr. Francis G. Hutchins states that in both the Treaty of Greenville and the Treaty of Canandaigua "the federal government acknowledged that the signatory tribes had a continued right to use and occupy certain land", and that neither of these treaties "conveyed fee-simple title to the signatory tribes." Sixth affidavit of Dr. Francis G. Hutchins, 11/14/90 ("6th Hutchins Aff."), ¶ 6(r). However, this legal argument is not only improper under Rule 10(c) of the local rules for the Northern District of New York, but it is also irrelevant in this court's analysis of the Treaty. As stated *supra*, the interpretation of language contained in a treaty is not a matter

However, *Williams* is readily distinguishable from the present case.

Initially, it must be reiterated that the *Williams* Court was interpreting the Treaty of Greenville, and not the Treaty of Canandaigua, when it determined that the Pottawatomie Nation of Indians did not possess fee simple title concerning the land at issue in that case. The Treaty of Greenville, unlike the Treaty of Canandaigua, does not acknowledge lands "reserved" to the tribe, nor does it refer to the land as a "reservation". Rather, the Treaty of Greenville provides that the United States relinquished its claims to certain lands referred to in that treaty-there is no acknowledgement of any reservation in that treaty, as there is in the Treaty of Canandaigua. Additionally, subsequent to the *Williams* decision, numerous courts, including the United States Supreme Court, have developed and clarified the distinction between aboriginal and reserved title. *See e.g., Tee-Hit-Ton Indians, supra,* 348 U.S. at 277-85, 75 S. Ct. at 316-20; *United States v. Sioux Nation of Indians,* 448 U.S. 371, 415 n. 29, 100 S. Ct. 2716, 2740 n. 29, 65 L.Ed.2d 844 (1980); *Lac Courte Oreilles Band etc. v. Voigt,* 700 F.2d 341, 351-52 (7th Cir.1983), *cert. denied & app'l dismissed sub nom.,* 464 U.S. 805, 104 S. Ct. 53, 78 L.Ed.2d 72 (1983); *Strong, supra,* 518 F.2d at 563; *Miami Tribe, supra,* 175 F. Supp. at 936-37 (interpreting the Treaty of Greenville to confer recognized title on the Miami Tribe of Oklahoma to certain lands described therein).

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of fact, but rather a question of law for a court to decide. *See Sioux Tribe, supra,* 500 F.2d at 462; *Ringrose, supra,* 788 F.2d at 643 n. 2; and *Strong, supra,* 518 F.2d at 563.

This court's holding does not stand for the proposition that *whenever* a treaty describes and refers to land claimed by an Indian tribe that such Indian tribe necessarily obtains recognized title in such land. Rather, this court has interpreted the language contained in the Treaty of Canandaigua which refers specifically to the plaintiffs. In this court's opinion, the Treaty's plain language confers reserved title to the Cayugas. The Treaty acknowledges lands "reserved" to the Cayugas, and refers to such land as their "reservation". Since the plaintiffs possess treaty-recognized title in the subject land, only Congress may divest the tribe of its title to this land. The fact that the Cayugas may no longer reside on the subject land is simply not a legally sufficient defense to the plaintiffs' claims, which are based upon federally recognized title. *Cf. Solem, supra*, 465 U.S. at 470, 104 S. Ct. at 1166; *Rosebud Sioux Tribe, supra*, 430 U.S. at 587-88, 97 S. Ct. at 1363-64; *De Coteau, supra*, 420 U.S. at 444, 95 S. Ct. at 1092-93; *Mattz, supra*, 412 U.S. at 504-05, 93 S. Ct. at 2257-58. *See also* F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) at 493.

(b) New York's interest concerning the subject land.

The defendants claim that the Treaty could not have conveyed recognized title to the plaintiffs because such conduct would have purportedly divested New York State of its alleged fee title interest in the land without affording the defendants the due process and just compensation required by the Fifth Amendment of the United States Constitution. They allege that Federal Treaty Commissioner Timothy Pickering believed that New York State owned fee title to the subject land, and that the only means by which title to the land could be altered would be with the consent of the New York

State legislature. They further contend that neither the United States Senate nor the State of New York believed that the Treaty of Canandaigua conferred any rights upon the Cayuga Indian Nation other than those rights the plaintiffs already possessed. Finally, they argue that had the State of New York understood the Treaty of Canandaigua to be interfering with New York's alleged property rights in the subject land, the State would have objected to this Treaty, as it had concerning the 1784 Confederal Treaty of Fort Stanwix and the 1789 Confederal Treaty of Fort Harmar.[8]

It is well settled that a State's affairs with an Indian tribe are subject to the paramount authority of the federal government governing such matters. *Tuscarora Nation of Indians v. Power Authority of New York*, 257 F.2d 885, 891 (2d Cir.1958); *cert. denied* 358 U.S. 841, 79 S. Ct. 66, 3 L.Ed.2d 76 (1958) ("[n]ot only has Congress not abandoned the field with respect to the property interests of Indian tribes in the State of New York, but it has . . . pointed up and reaffirmed its paramount authority over Indian tribal lands); *Mulkins v. Snow et al.*, 232 N.Y. 47, 51, 133 N.E. 123 (Ct. App.1921) (Pound, J.) ("[w]hen the state of New York legislates in relation to [Indian] affairs, its action is subject to the paramount authority of the federal government").

Contrary to the defendants' assertions, the State of New York did not possess a property interest in the subject land. Their interest in this land was, at most, a right of preemption-the right to purchase the property if and when the plaintiffs' title to the land was extinguished. Such a right of preemption is not a property right, but rather a mere expectancy concerning the

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[8] *See generally* Def.Resp.Memo., pp. 4-10.

property, with no right vesting in such person until Congress acts to extinguish the Indian interest in the land. *See e.g.*, F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) at 514 and cases cited therein. Once New York State ratified the United States Constitution, relations with Indian tribes and authority over Indian lands fell under the exclusive province of federal law. *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 234, 105 S. Ct. 1245, 1251, 84 L.Ed.2d 169 (1985), *reh'g denied* 471 U.S. 1062, 105 S. Ct. 2173, 85 L.Ed.2d 491 (1985). Thus, the conditions under which New York's right of preemption to the subject property could be exercised by the State are governed solely by federal law. *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661, 670, 94 S. Ct. 772, 779, 39 L.Ed.2d 73 (1974). The Treaty of Canandaigua was simply an assertion by the federal government of its superior authority over matters involving Indian affairs granted to the federal government by the Constitution; it did not divest the State of New York of any property right concerning the subject land.

Defendants' contention that the Treaty cannot be interpreted as conferring reserved title to the Cayugas because of the State's apparent acquiescence concerning the ratification of the Treaty is also without merit. As this court has noted, by its ratification of the Treaty the federal government did not divest the State of New York of any property interest in the subject land. Moreover, as the plaintiffs point out, any actions taken by the State relating to the Treaties of Fort Stanwix and Harmar-treaties which were entered into while this Nation was operating under the Articles of Confederation-are irrelevant in interpreting the rights

conferred by the 1794 Treaty of Canandaigua. While the State retained certain rights with respect to Indian lands within its borders under the Articles of Confederation, such rights were ceded by the State to the federal government by the State's ratification of the Constitution. Any preemptive rights the State had concerning the purchase of the subject land were necessarily subject to the federal government's power regarding the extinguishment of the Cayugas' title to this land; *see e.g., Cayuga I*, 565 F. Supp. at 1312 n. 10; for only Congress may divest an Indian tribe of its recognized title to Indian land. *Cf. Solem, supra*, 465 U.S. at 470, 104 S. Ct. at 1166; *Rosebud Sioux Tribe, supra*, 430 U.S. at 587-88, 97 S. Ct. at 1363-64; *De Coteau, supra*, 420 U.S. at 444, 95 S. Ct. at 1092-93; *Mattz, supra*, 412 U.S. at 504-05, 93 S. Ct. at 2257-58. The State of New York's actions-or inactions-regarding the ratification of the Treaty of Canandaigua did not somehow exempt the State from the normal operation of federal law concerning the diminishment of an Indian reservation.

Simply put, the plain language of the Treaty of Canandaigua indicates to this court that this Treaty conferred recognized title to the Cayugas concerning the subject property. The State of New York did not have a compensable property interest in this land at the time this Treaty was ratified. New York's failure to object to the federal government's ratification of the Treaty of Canandaigua is not a ground for this court to conclude that this Treaty did not confer recognized title to the plaintiffs concerning the subject land. Accordingly, the plaintiffs' motion for partial summary judgment must be granted, as the affirmative defense of

abandonment is legally insufficient to defeat the plaintiffs' claim to the subject land.

(2) Plaintiffs' physical abandonment of the land.

The defendants contend that proof of the plaintiffs' physical abandonment of this land precludes the Cayugas from prevailing on the claims asserted in the present action.[9]

Relying on several affidavits of Dr. Francis G. Hutchins and numerous exhibits submitted therewith, the defendants contend that there is no evidence that the Cayuga tribe ever occupied the subject land after 1794.[10] They claim that in that year, the Cayugas, led by an Indian named Fish Carrier, (whom the defendants allege was the Cayugas' "supreme leader" from 1775 to 1796) left Buffalo Creek and relocated to Grand River in Canada.[11] They further allege that the Indians who remained in the subject lands after 1794 were not members of the Cayuga tribe.[12]

The plaintiffs dispute these contentions. They claim that Fish Carrier was never a League Chief of the Cayugas, and that there was no one supreme leader of the Cayugas.[13] The plaintiffs also disagree with the

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[9] It appears as though this argument in support of their motion for summary judgment is based on the defendants' erroneous assumption that the plaintiffs only possessed aboriginal title to the subject land. Nevertheless, a brief review of this argument is warranted.

[10] *See e.g.*, fifth affidavit of Dr. Francis G. Hutchins, 9/28/90, ¶ 5(1); fourth affidavit of Dr. Francis G. Hutchins, 8/29/90 ("4th Hutchins Aff."), ¶ 5(nn).

[11] 4th Hutchins Aff., ¶ 5(a)-(d); 6th Hutchins Aff., ¶ 6(f)-(h).

[12] 4th Hutchins Aff., ¶ 5(ii)-(jj).

[13] Affidavit of Dr. Elizabeth Tooker, 9/26/90, ¶ 6.

defendants' assertions concerning the time of the exodus of the Cayugas from the subject land to Grand River. While they concede that some members of the tribe lived at Buffalo Creek from 1780 to 1794,[14] they claim that:

> [T]he historical record is clear that other members of the Cayuga Nation, under the leadership of other Cayuga chiefs, continued to live on and occupy the Reservation at Cayuga Lake well after the treaties with the State of New York in 1789 and 1795 and probably into the early years of the nineteenth century.[15]

The plaintiffs proffered several exhibits to the court which supported their position that some members of the Cayuga tribe resided on the subject land some time after 1794.

It is clear that there are questions of fact concerning whether Fish Carrier was a supreme leader of the Cayugas who led all members of the Cayuga tribe out of the subject land in 1794. Both parties have proffered evidence to this court which supports their respective positions. However, even if the defendants are correct in their assertions concerning the Cayugas' physical abandonment of the land at issue, the plaintiffs are nevertheless entitled to partial summary judgment. As stated earlier by this court, proof of a tribe's physical abandonment of land is only a defense to a claim which is based upon aboriginal title to such land. This court has found that the plaintiffs obtained recognized title to the subject land by the Treaty of Canandaigua, and

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[14] *See id.* ¶ ¶ 8-9.

[15] *Id.*, ¶ 9.

therefore only Congress can divest the plaintiffs of their title to this land. Thus, evidence of the plaintiffs' physical abandonment of the subject land is both irrelevant and immaterial to the present action, which is based upon reserved title to such land.

Conclusion

The 1794 Treaty of Canandaigua conferred recognized title to the Cayugas concerning the land at issue in this proceeding. This Treaty did not deprive the State of New York of any property interest in such land, because the State only possessed, at most, a right of preemption regarding the subject land, i.e., the right to purchase the property if and when the Cayugas' title to the land was extinguished by the federal government. New York's acquiescence concerning federal ratification of the Treaty of Canandaigua did not prevent the plaintiffs from obtaining recognized title to the subject property. Finally, proof of the plaintiffs' physical abandonment of the property at issue is irrelevant in a claim for land based upon reserved title to Indian land, for such title can only be extinguished by an act of Congress.

Accordingly, plaintiffs' motion for partial summary judgment is granted, and defendants' motion for summary judgment is denied.

IT IS SO ORDERED.

APPENDIX I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK.

Nos. 80-CV-930, 80-CV-960

THE CAYUGA INDIAN NATION OF NEW YORK,
ET AL., PLAINTIFFS
AND
THE SENECA-CAYUGA TRIBE OF OKLAHOMA,
PLAINTIFF-INTERVENOR

v.

MARIO M. CUOMO, ET AL., DEFENDANTS

Feb. 15, 1990

MEMORANDUM-DECISION AND ORDER

MCCURN, Chief Judge.

By this motion, the plaintiff Cayuga Indian Nation and the plaintiff-intervenor Seneca-Cayuga Tribe of Oklahoma (collectively referred to as "the plaintiffs" or "the Cayugas") seek a declaration that two conveyances of land, one occurring in 1795, and the other occurring in 1807, are invalid under the Nonintercourse Act (or "Act"), 25 U.S.C. § 177. The defendants oppose said motion, claiming that questions of fact exist concerning the circumstances surrounding these conveyances. For the reasons stated below, this court grants the plaintiffs' motion for partial summary judgment, and de-

clares that the conveyances at issue were never properly ratified by the federal government as required by the Nonintercourse Act.

BACKGROUND

This is the third memorandum-decision written by this court concerning the instant action, and familiarity with this case is presumed. *See Cayuga Indian Nation of New York et al. v. Cuomo et al.*, 565 F. Supp. 1297 (N.D.N.Y. 1983) *("Cayuga I")*, *Cayuga Indian Nation of New York et al. v. Cuomo et al.*, 667 F. Supp. 938 (N.D.N.Y. 1987) (*"Cayuga II"*). Nevertheless, a brief review of the facts surrounding this lawsuit is in order.

The plaintiffs' complaint seeks a declaration of their current ownership of and right to possess a tract of land in central New York State containing approximately 64,000 acres, an award of fair rental value for the almost two hundred years during which they have been out of possession of said land, and other monetary and protective relief.

This court has previously held that the plaintiffs can present evidence in support of the above claim, *see Cayuga I*, 565 F. Supp. at 1330, and in *Cayuga II* both parties' motions for summary judgment were denied. *Id.*, 667 F. Supp. at 949.

DISCUSSION

The most recent pronouncement of the Nonintercourse Act, which has been in effect in various versions for nearly two hundred years, provides as follows:

§ 177. Purchases or grants of lands from Indians

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

25 U.S.C. § 177.

As stated in Cayuga II, to establish a violation of the Nonintercourse Act, a plaintiff must prove that: (1) it is or represents an Indian tribe within the meaning of the Act; (2) the parcels of land at issue are covered by the Act as tribal land; (3) the United States has never consented to the alienation of the tribal land; and (4) the trust relationship between the United States and the tribe has never been terminated.[1] *Cayuga II*, 667 F. Supp. at 941 and cases cited therein.

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[1] The Cayuga Indian Nation's members maintain that they are the direct successors in interest to the Cayuga Nation of the Six Nation Iroquois Confederacy which, until the acts complained of in

This court has found that the plaintiffs have, as a matter of law: (1) established for purposes of the Nonintercourse Act that they represent an Indian tribe within the meaning of the Act; (2) proven that the land in question is covered by the Act as tribal land, and (3) demonstrated that the requisite trust relationship concerning the fourth requirement of a Nonintercourse Act suit exists between the plaintiffs and the federal government. *Id.*, 667 F. Supp. at 943.

In that decision, it was noted that the factual record concerning the circumstances surrounding the 1795 and 1807 land conveyances was, at the time, incomplete. *Id.* at 945. Consequently, this court could not determine whether the United States had ever consented to the conveyances at issue, and both parties' motions for summary judgment were denied. *Id.* at 949.

Since that order, the parties have been afforded more than two years of additional discovery. Thus, this court is confident that the parties have had ample time to discover any and all relevant documents concerning these conveyances, and will now consider the merits of plaintiffs' contention that the United States never consented to either of these land conveyances.[2]

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this suit, occupied the land at issue since time immemorial. *Cayuga I*, 565 F.Supp. at 1302. The Six Nations in this Confederacy were comprised of the Oneida, Tuscarora, Mohawk, Onondaga, Cayuga and Seneca Nations. *Id.* at 1303.

[2] The procedural posture of this case is readily distinguishable from the procedural history found in *Oneida Indian Nation of N.Y. v. State of New York*, 520 F.Supp. 1278 (N.D.N.Y.1981), *aff'd in part, rev'd in part* 691 F.2d 1070 (2d Cir. 1982), *cert. denied* 474 U.S. 823, 106 S. Ct. 78, 88 L.Ed.2d 64 (1985).

The district court in that case had taken judicial notice of correspondence, notes, and other historical evidence proffered by the

For a treaty to be valid under the Nonintercourse Act, it must be (1) made in the presence of a federal treaty commissioner, and (2) entered into pursuant to the Constitution. See 25 U.S.C. § 177.

The plaintiffs assert that no federal treaty commissioners were present at either the 1795 or the 1807 land conveyances. Additionally, they claim that neither of these New York treaties were approved by the President with the advice and consent of the United States Senate, and therefore neither conveyance was entered into pursuant to the Constitution.

Defendants claim that federal treaty commissioners were present at the time of both land conveyances, and that the federal government ratified both of these treaties in a manner consistent with the Nonintercourse Act.

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parties as an aid in interpreting the Articles of Confederation, the Proclamation of 1783, and the 1784 Fort Stanwix Treaty. *See generally Oneida Indian Nation of N.Y. v. State of New York* 520 F. Supp. at 1308-28.

In finding the exercise of judicial notice inappropriate under the circumstances, the Second Circuit noted that "when facts or opinions found in historical materials or secondary sources are disputed, it is error to accept the data (however authentic) as evidence." *Oneida Indian Nation*, 691 F.2d at 1086. The Second Circuit held that the opposing party in such situations should be afforded an opportunity to present information which might challenge the facts or propriety of disputed historical data. *Id.*

In the instant case, this court has utilized affidavits of historians provided by both parties in interpreting various documents relevant to the present action. Thus, unlike in *Oneida Indian Nation*, the parties here have presented information they believe supports their interpretation of disputed historical data, and therefore this court may properly reach the merits of the plaintiffs' arguments.

(1) The presence of federal treaty commissioners.

For a conveyance to be valid under the Nonintercourse Act, the sale must be made "in the presence and with the approbation of the commissioner of the United States to hold [treaties]." 25 U.S.C. § 177. Thus, the New York treaties could only be valid if they were made in the presence of a federal treaty commissioner.

The plaintiffs contend that there is no evidence that any such commissioner was present at the time of either of the two conveyances. The defendants argue that both Jasper Parrish and Israel Chapin Jr. were present at the time the agreements at issue were made, and that these individuals were official representatives of the United States.

In light of the differing views held by the parties concerning the role these men played with respect to these conveyances, this court, with the assistance of testimony from historians provided by both parties, has examined the actions taken by both Jasper Parrish and Israel Chapin, Jr., in order to determine whether either of these individuals, or both, were federal treaty commissioners at the time of the 1795 and 1807 conveyances.

(a) *Jasper Parish.*

At the time New York entered into the 1795 and 1807 treaties with the Cayugas, Jasper Parrish was an interpreter employed by the federal government. He was present at treaty negotiations in both 1795 and 1807, and signed the 1795 treaty between New York

and the plaintiffs as a witness and as an interpreter in the federal service.[3]

On February 15, 1803, Parrish was appointed to the position of Indian sub-agent to the Six Nations.[4] On February 26, 1807, Parrish travelled with Cayuga representatives to a negotiation session in Albany, New York wherein New York agreed to purchase any remaining land-use rights the plaintiffs still possessed.[5] Parrish signed and witnessed the final 1807 agreement between the Cayugas and the defendants. Additionally, Parrish transmitted the consideration paid by New York State for the acquisition of the Cayuga land under the 1807 treaty.[6]

(b) *Israel Chapin Jr.*

General Israel Chapin, Sr. was an appointed U.S. agent to the Six Nations and was specifically authorized by both the President and Secretary of War Timothy Pickering to facilitate negotiations between the Cayugas and New York State for the sale of the land at Cayuga Lake.[7] After Chapin Sr.'s death, Pickering appointed Israel Chapin Jr. to succeed his father as a U.S. Agent.[8]

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[3] Affidavit of Francis G. Hutchins, 11/17/89, "Hutchins Affidavit", ¶ ¶ 4(r), 4(s).

[4] *Id.*, ¶ 4(t).

[5] *Id.*, ¶ 4(cc).

[6] *Id.*, ¶ 4(ee). While the defendants do not explicitly state that Parrish was a federal treaty commissioner, they do argue that, as a federal official, he was competent to treat with the Indians concerning the land conveyances at issue.

[7] *Id.*, ¶ [illegible].

[8] *Id.*, ¶ 4(k). The letter wherein Pickering appointed Chapin Jr. to this position stated: "[t]he public instruction formerly given

In claiming that Chapin, Jr. had no authority to treat with the Indians on behalf of the federal government, the plaintiffs submit a letter written by Pickering to General Israel Chapin, Sr., which stated that "unless a commissioner of the U. States holds the [Buffalo Creek] treaty neither you nor Mr. Parish are to give any countenance to it."[9] The plaintiffs contend that this proves that Chapin Sr. was himself not a federal treaty commissioner.

As further support for this contention, the plaintiffs cite a letter Israel Chapin Jr. wrote to Pickering about the New York treaties. This letter stated that Chapin, Jr. had "supposed the Commissioners [present at the 1795 treaty] were fully authorized by the Government of the United States as well as that of their own with full powers to transact the business."[10]

While the plaintiffs contend that this is proof that Israel Chapin Jr. did not believe himself to be a federal treaty commissioner, the defendants proffer this letter as proof that Chapin Jr. assumed he was so authorized, and this letter was sent merely to confirm his beliefs.

Additionally, the defendants have proffered testimony which indicates that Israel Chapin Jr. was in attendance with the Cayugas at Cayuga lake as an official representative of the United States when the

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to your father and which you will find among his papers, you will at present take for the general rule of your conduct." *Id.*, ¶ 4(*l*).

[9] This letter is reproduced in plaintiffs' Reply Memorandum in support of their motion for partial summary judgment, "Plaintiffs' Reply Memorandum", at exhibit 1(c).

[10] This letter is reproduced in plaintiffs' Reply Memorandum in support of their motion for partial summary judgment, "Plaintiffs' Reply Memorandum", at exhibit 1(c).

1795 New York treaty was signed.[11] Further, Chapin's signature appears on the 1795 conveyance as the first among ten witnesses.[12]

Since there is conflicting testimony concerning whether Jasper Parrish or Israel Chapin, Jr. were officials representing the federal government at the time of the conveyances at issue, it would be inappropriate for the court, on a motion for summary judgment, to resolve this dispute in favor of the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

Accordingly, for purposes of this motion, this court will assume that federal treaty commissioners were present at the time of the 1795 and 1807 conveyances.

(2) Federal ratification of the 1795 and 1807 conveyances.

The mere presence of federal treaty commissioners at treaty negotiations, or signatures of such individuals as witnesses to conveyances of land between New York State and the Cayugas, does not amount to federal ratification of treaties under the Nonintercourse Act. Rather, the United States must consent to the alienation of tribal land by way of a "treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177.

The parties in this action have widely differing interpretations of this portion of the Act. The plaintiffs maintain that the language "pursuant to the constitution" requires all Indian land conveyances be entered into in accordance with the treaty *489 making powers

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[11] *See id.*, ¶ 4(r).

[12] *Id.*, ¶ 4(s).

of the federal government as set forth in Article II, Section 2 of the Constitution. The defendants argue that the words in this statute are vague, and that the federal government may ratify an Indian treaty in any manner which demonstrates the federal government's clear and unambiguous consent to the conveyance.

In *Mashpee Tribe v. Watt*, 542 F. Supp. 797 (D. Mass. 1982), *aff'd* 707 F.2d 23 (1st Cir. 1983), *cert. denied* 464 U.S. 1020, 104 S. Ct. 555, 78 L.Ed.2d 728 (1983), the court, in discussing the requirements of the Nonintercourse Act, held that:

> [u]nder the Nonintercourse Acts, the restraint on alienation could be released only by treaty or convention. Treaties and conventions are made by the President with the advice and consent of the Senate.

Id. 542 F. Supp. at 805.

This interpretation of 25 U.S.C. § 177 was confirmed by the United States Supreme Court in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 105 S. Ct. 1245, 84 L.Ed.2d 169 (1985). In this case, the Supreme Court discussed, *inter alia*, the requirements of federal ratification of treaties under the Indian Trade and Intercourse Act.[13] The Court noted that all conveyances of Indian land under this Act were prohibited "except where such conveyances were entered into pursuant to the treaty power of the Unit d States." *Id.* at 231-32, 105 S. Ct. at 1250.

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[13] As the Supreme Court has noted, the Nonintercourse Act is "a stronger, more detailed version of the [Indian Trade and Intercourse] Act." *County of Oneida*, 470 U.S. at 232, 105 S. Ct. at 1250. Additionally, the non-alienability clauses found in both the Indian Trade and Intercourse Act and the Nonintercourse Act are substantially similar. *Cayuga I*, 565 F. Supp. at 1304.

Additionally, since this court's decision in *Cayuga II*, the plaintiffs have proffered evidence which demonstrates that Timothy Pickering, whom the defendants concede was "the senior federal official, under the President, in charge of Indian affairs[14] unequivocally believed that ratification under the Nonintercourse Act required a treaty signed by the President with the advice and consent of the Senate.[15]

Therefore, at the present time, it is clear that the 1795 and 1807 land conveyances could only be valid if they were entered into pursuant to the treaty power of the United States. This power, found in Article II, Section 2 of the U.S. Constitution, provides that "[the President] shall have the power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ." U.S. Const., Art. II, Sec. 2.

In discussing whether the defendants have provided this court with any evidence of such an express federal treaty, this court has already noted that:

> [a]lthough the parties are in vehement disagreement on the issue of whether ratification of the 1795 and 1807 conveyances occurred, they do not appear to disagree on the issue of whether the conveyances were accomplished by treaties made by the President with the consent of the Senate. Stated simply, the record is completely void of any indication that the president made the 1795 and 1807 treaties with the consent of the Senate. Thus, if it is

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[14] Supplemental Affidavit of Francis G. Hutchins, 4/25/85, ¶ 4(d).

[15] See letter from Timothy Pickering to John Jay, ¶ 2, reproduced in Plaintiffs' Reply Memorandum at exhibit 1(d).

> ultimately decided that such requirements must be met before a valid conveyance of Indian land must be made, then the plaintiffs have established a prima facie case of a violation of the Nonintercourse Act.

Cayuga II, 667 F. Supp. at 944-45.

Two years later, the defendants have still failed to proffer any evidence of the federal government's express ratification of the 1795 and 1807 land conveyances.

Since there is no proof that the conveyances of 1795 and 1807 were ever ratified by the federal government in accordance with Article II, Section 2 of the U.S. Constitution, the plaintiffs are entitled to partial summary judgment on this theory alone. However, since the plaintiffs' motion could be granted under the defendants' interpretation of the Nonintercourse Act as well, this court will analyze their contention that the federal government plainly, unambiguously, and explicitly ratified the 1795 and 1807 New York treaties.

This court has previously held that, at a minimum, federal government ratification of a conveyance of Indian land must be plain, unambiguous, and explicit. *Cayuga II*, 667 F. Supp. at 944. In support of their claim that they have amply demonstrated federal ratification of the 1795 and 1807 conveyances, the defendants point to the correspondence of various figures from this country's past, including letters from former President George Washington, former Chief Justice of the U.S. Supreme Court John Jay, and former Secretary of War Timothy Pickering. The defendants also claim that the findings of the British-American Arbitral Tribunal demonstrates clear and unambiguous ratification of the

1795 and 1807 conveyances. Finally, the defendants argue that the 1838 Buffalo Creek Treaty ratified the 1795 and 1807 conveyances. These contentions will now be addressed *seriatim*.

(a) *Historical Correspondence.*

The defendants contend that federal ratification of the 1795 land conveyance is demonstrated in part by the fact that George Washington did not submit the 1795 document pertaining ' ` this agreement to the United States Senate for ratification. In support of this theory, they proffer a letter sent by Washington to Timothy Pickering, wherein Washington states:

> If the meeting of the Commissioners, appointed to treat with the . . . Cayugas . . . took place . . . any further sentiment now on .the unconstitutionality of the measure would be received too late. If it did not take place, according to expectation it is my desire that you would obtain the best advice you can on the case and do what prudence, with a due regard to the constitution and laws, shall dictate.[16]

As this letter indicates, Washington believed that he had either been contacted too late concerning his opinion about the constitutionality of the 1795 treaty, or that the parties involved should act with prudence and due regard to the U.S. Constitution and laws when arriving at an agreement.

President Washington believed that treaties entered into under what is now the Nonintercourse Act required "'a public treaty, held under the authority of the United States.'" *Seneca Nation of Indians v. United*

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[16] Hutchins Affidavit, ¶ 4(v).

States, 173 Ct. Cl. 917, 923 (1965). Additionally, both sides agree that George Washington "adhered steadfastly to treaty formalities" when dealing with Indian nations.[17]

In light of these facts, this court is not persuaded that either the aforementioned letter, or Washington's refusal to submit the 1795 treaty to the Senate, is proof of plain, unambiguous, and explicit federal ratification of the 1795 conveyance.[18]

Defendants also contend that a letter from John Jay to Timothy Pickering is evidence of federal ratification of the agreements at issue. Jay, then Governor of New York, and Pickering had been debating the validity of the 1795 conveyance in light of the Indian Trade and Intercourse Act. In this letter, Jay states:

> [w]hether the Constitution of the United States warrants the [Trade and Intercourse] act of Congress of the 1 March 1793, and whether the act of this State [i.e. New York] respecting the business now negotiating with the Onondaga and other tribes of Indians, is consistent with both or either of them, are questions which on this occasion I think I should forbear officially to consider and decide.[19]

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[17] Defendants' memorandum in opposition to plaintiffs' motion for partial summary judgment, "Defendants' Memorandum", p. 4, Plaintiffs' Reply Memorandum, p. 8.

[18] As the plaintiffs point out, the fact that Washington never submitted the document for Senate approval or formally proclaimed the treaty may be probative of the fact that Washington viewed the document as invalid and unworthy of further consideration. *See* Plaintiffs' Reply Memorandum, pp. 8-9, n. 4.

[19] Hutchins Affidavit, ¶ 4(b).

The fact that Jay, who was not a federal official at the time he wrote the letter at issue, refused to officially consider whether the proposed treaty was consistent with the U.S. Constitution is clearly not proof of plain, unambiguous, and explicit federal ratification of the 1795 conveyance.

The defendants allege that federal consent to the 1795 conveyance is further evidenced by a letter sent by Timothy Pickering in his capacity as Secretary of War to George Clinton, then Governor of New York, on January 30, 1795. This letter, which was sent "[b]y the direction of the President of the United States", transmitted the Cayuga chiefs' request that New York State purchase the tribe's land-use rights.[20] The letter outlined the steps the chief believed should be taken by the State in acquiring the Cayuga's land.[21]

The defendants claim that since Pickering's letter did not qualify the procedure the Cayuga chief had outlined for the acquisition of the Cayuga land, Pickering, and therefore the federal government, had "[i]ntentionally or not . . . given endorsement to the procedure outlined in the chiefs' request."[22] This position is untenable.

Clearly, an unintentional act on the part of Pickering would not be a plain, unambiguous, and explicit federal ratification of the 1795 conveyance. Additionally, numerous letters written by Pickering demonstrate that he believed that any treaty with the Cayugas would have to be formally ratified by Congress before a conveyance

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[20] *Id.*, ¶ 4(i).

[21] *Id.*,¶ ¶ 4(i), 4(j).

[22] Defendants' Memorandum, p. 9.

of tribal land would be valid under the Indian Trade and Intercourse Act.

For example, on June 29, 1795, Pickering wrote to Israel Chapin Sr., an agent to the Six Nations. In this letter, Pickering stated that the proposed treaty between New York State and certain tribes, including the Cayugas, would be "repugnant to the law of the United States."[23] Later that same year Pickering, on September 1, 1795, wrote a letter to then Governor John Jay. In describing what he believed to be the ratification requirements under the Indian Trade and Intercourse Act, Pickering stated:

> [Although] the cession of Indian land will be to the State, . . . the instrument of cession is to be in the form of a treaty or convention, to be entered into "pursuant to the constitution;" of course to be ratified by the President with the advice and consent of the Senate. The State Commissioners negotiate only for the price (emphasis added).[24]

Thus, it is clear that Pickering believed that the proper procedure for federal ratification of an Indian treaty was an express treaty between the United States and the Indian tribe, ratified by the President with the advice and consent of the Senate. Defendants' contentions that Pickering believed otherwise are disproven by Pickering's own letters.

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[23] *See* letter from Timothy Pickering to Israel Chapin, Sr., reproduced in Plaintiffs' Reply Memorandum at exhibit 1(a).

[24] This letter is reproduced in Plaintiffs' Reply Memorandum at exhibit 1(d).

(b) *The British-American Arbitral Tribunal.*

The defendants also allege that findings of the British-American Arbitral Tribunal demonstrate federal ratification of the 1795 land conveyance.

On August 18, 1910, the United States and Great Britain, in an attempt to resolve certain claims which existed between the two governments, entered into an agreement which established an Arbitral Tribunal ("Tribunal").[25] Among the claims to be resolved by the Tribunal was a claim by Great Britain on behalf of the Cayuga Indians of Canada.

On January 22, 1926, the Tribunal published an award which required the government of the United States to pay Great Britain $100,000 as trustee for the Canadian Cayuga Indian tribe.[26] Later that year, President Coolidge, with the approval of both houses of Congress, included in the federal government's budget the funds required to pay Great Britain this award. The defendants argue that the payment of this award demonstrates the federal government's consent to the 1795 conveyance. However, any payments the federal government made pursuant to an arbitration award published more than one hundred and thirty years after the 1795 agreement at most constitutes an implicit ratification of the conveyance, and therefore is not evidence of a plain, unambiguous, and explicit ratification of the 1795 agreement.

The defendants also claim that "[t]he Arbitral Tribunal found unanimously that the 1795 Treaty was valid under pertinent federal law and that the federal

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[25] Hutchins Affidavit, ¶ 4(mm).

[26] *Id.*, ¶ 4(pp).

government had knowledge of and responsibility to enforce the treaty's terms."[27] The Arbitral Tribunal cited by the defendants found that:

> [n]either in form nor in substance was the Treaty of 1795 a Federal Treaty; it was a contract of New York with respect to a matter as to which New York was fully competent to contract. In form it is exclusively a New York contract. The negotiators derived their authority from the State legislature and purported to represent the State only. The United States does not appear anywhere in the negotiations nor in the treaty. The United States Indian agent, who was present at the request of the Indians because they had confidence in him, appears as a witness in his personal, not his official, capacity.[28]

Since the Tribunal explicitly found that the treaty of 1795 was not a federal treaty in either form or substance, the defendants' contention that it found the conveyance valid under pertinent federal law is without merit.

(c) *The Buffalo Creek Treaty of 1832.*

The defendants' final argument in opposition to the plaintiffs' motion for partial summary judgment is that the federal government ratified the 1795 and 1807 New York treaties through its ratification of the Buffalo Creek treaty in 1832. In this treaty, which was ratified by the Senate and signed by the President, several

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[27] Defendants' Memorandum, p. 16.

[28] Nielsen, *American and British Claims Arbitration*, p. 326 (G.P.O.1926), reproduced in Plaintiffs' Reply Memorandum at exhibit "E".

New York tribes, including the Cayugas, relinquished their rights to portions of land they had owned in Green Bay, Wisconsin.

Defendants point to two aspects concerning this treaty in support of their proposition that it retroactively ratified the 1795 and 1807 conveyances at issue. First, the defendants note that R.H. Gillett, a federal treaty commissioner, in describing the Cayuga Indian tribe to then Commissioner of Indian Affairs C.A. Harris, stated that the Cayugas were a tribe consisting of 130 individuals, and that "[m]any years since this tribe sold out all their lands, and gave the Senecas $800, for the privilege of residing on their reservations."[29] Additionally, the defendants note that Article 10 of the Buffalo Creek Treaty states that the Cayuga Indian tribe "agree[s] to remove from the State of New York to their new homes within five years and to continue to reside there."[30] The defendants contend that "in ratifying the Buffalo Creek Treaty, the President and the Senate explicitly approved the removal of the plaintiffs from New York State", and therefore, by analogy, the 1795 and 1807 treaties.

However, as with their arguments concerning the British-American Arbitral Tribunal, the events discussed by the defendants concerning the Buffalo Creek treaty at best demonstrate an implicit, rather than an explicit, approval of the 1795 and 1807 conveyances.

Since this court has previously held that congressional ratification under the Nonintercourse Act must be explicit, and not implicit, *see Cayuga II*, 667 F. Supp. at 944, 945, the defendants' contention that the 1795 and

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[29] Hutchins Affidavit, ¶ 4(jj).

[30] Defendants' Memorandum, pp. 19-20.

1807 conveyances were ratified by the subsequent ratification of the Buffalo Creek treaty is without merit.

In sum, none of the correspondence proffered by the defendants as proof of the federal government's alleged ratification of the 1795 and 1807 land conveyances demonstrates that the United States consented to these purported treaties in plain, unambiguous, and explicit terms. Additionally, evidence proffered by the defendants concerning the findings of the British-American Arbitral Tribunal, and the effect of the Buffalo Creek Treaty of 1832 is, at most, proof of an implicit ratification of the 1795 and 1807 agreements, and therefore insufficient to demonstrate explicit ratification of the conveyances, as would be required by the defendant's interpretation of the Nonintercourse Act.

CONCLUSION

The defendants have been unable to establish a genuine issue of material fact concerning alleged ratification by the federal government of the 1795 and 1807 land conveyances at issue. There is no evidence before this court that the President, with the advice and consent of the Senate, ever ratified these conveyances by an express federal treaty. Additionally, the defendants have not proven that the circumstances surrounding the conveyances demonstrated a plain, unambiguous, and explicit ratification of the New York treaties by the United States government. For both of these reasons, this court grants the plaintiffs' motion for partial summary judgment.

IT IS SO ORDERED.

APPENDIX J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK.

Nos. 80-CV-930, 80-CV-960

THE CAYUGA INDIAN NATION OF NEW YORK, ET AL.,
PLAINTIFFS
AND
THE SENECA-CAYUGA TRIBE OF OKLAHOMA,
PLAINTIFF-INTERVENOR

v.

MARIO M. CUOMO, ET AL., DEFENDANTS

Aug. 21, 1987

MEMORANDUM-DECISION AND ORDER

McCURN, Chief Judge.

In this action, one of a number with which the court has dealt involving Indian land claims, the court is being asked by the plaintiff, the Cayuga Nation of New York, and the plaintiff-intervenor, the Seneca-Cayuga Tribe of Oklahoma (the plaintiffs),[1] to determine that two conveyances of land, one occurring in 1795, and the other occurring in 1807, violated the Nonintercourse Act (or the Act), 25 U.S.C. § 177. The court has already

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[1] The court need not resolve any dispute at this time between the plaintiff and the plaintiff-intervenor as to who has the actual right to claim interest in the land in question.

written one lengthy opinion in this action denying the defendants' motions to dismiss, and in that opinion, with which familiarity will be presumed, the court set forth in detail the basic factual background of this action. *Cayuga Indian Nation of New York* v. *Cuomo*, 565 F. Supp. 1297 (N.D.N.Y. 1983) (McCurn, J.). Currently pending before the court are a motion by the plaintiffs for partial summary judgment and motions by the defendants for summary judgment made pursuant to Fed. R. Civ. P. 56.

Before addressing the merits of the motions, the court should make clear its role at this stage of the proceedings. In a recent trilogy of cases, the Supreme Court has illuminated the responsibility of the district court and the burdens on the parties when dealing with summary judgment motions. See *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986).

In Anderson, the Court stated:

> Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judg-

ment; the requirement is that there be no genuine issue of material fact.

As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. See generally 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2725, pp. 93-95 (1983). This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs. Any proof or evidentiary requirements imposed by the substantive law are not germane to this inquiry, since materiality is only a criterion for categorizing factual disputes in their relation to the legal elements of the claim and not a criterion for evaluating the evidentiary underpinnings of those disputes.

106 S. Ct. at 2510. The Court went on to state:

Our prior decisions may not have uniformly recited the same language in describing genuine factual issues under Rule 56, but it is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. As *Adickes* [v. *S.H. Kress & Co.*, 398 U.S. 144 [90 S. Ct. 1598, 26 L.Ed.2d 142] (1970)],

> *supra*, and [*First National Bank of Arizona v.*] *Cities Service* [*Co.*, 391 U.S. 253, 88 S. Ct. 1575, 20 L.Ed.2d 569 (1968)], *supra*, indicate, there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Cities Service*, 391 U.S., at 288-289, 88 S. Ct., at 1592. If the evidence is merely colorable, *Dombrowski* v. *Eastland*, 387 U.S. 82, 87 S. Ct. 1425, 18 L.Ed.2d 577 (1967) (per curiam), or is not significantly probative, *Cities Service, supra*, [391 U.S.] at 290, 88 S. Ct. at 1592, summary judgment may be granted.

Id. at 2511. In *Celotex*, the Court discussed the burden on a party opposing a motion for summary judgment:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . . ." *Anderson* v. *Liberty Lobby, Inc.*, [477] U.S.

> [242], [——], 106 S. Ct. [2505], [——], 90 [91] L.Ed.2d [202] (1986).

106 S. Ct. at 2552-53. With the procedural fundamentals of summary judgment motions firmly in hand, the court will proceed to address the merits of the pending motions.

I.

The most recent pronouncement of the Nonintercourse Act, which has been in effect in various versions for almost two hundred years, is as follows:

> § 177. Purchases or grants of lands from Indians
>
> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

25 U.S.C. § 177.

The plaintiffs contend that the 1795 and 1807 conveyances of land, made pursuant to treaties with the State of New York, were invalid under the Act because the requisite federal government ratification was never received.

To establish a violation of the Nonintercourse Act, a plaintiff must show that: (1) it is or represents an Indian tribe within the meaning of the Act; (2) the parcels of land at issue are covered by the Act as tribal land; (3) the United States has never consented to the alienation of the tribal land; and (4) the trust relationship between the United States and the tribe has never been terminated or abandoned. *Oneida Indian Nation of New York* v. *County of Oneida*, 434 F. Supp. 527, 537-38 (N.D.N.Y. 1977), *aff'd and rem'd*, 719 F.2d 525 (2d Cir.1983), *aff'd in part and rev'd in part*, 470 U.S. 226, 105 S. Ct. 1245, 84 L.Ed.2d 169 (1985); *Mashpee Tribe* v. *New Seabury Corp.*, 427 F. Supp. 899, 902 (D. Mass. 1977).

The defendants, asking for no quarter and giving none, are battling the plaintiffs right from the start by arguing that the plaintiffs have yet to prove their tribal existence. The plaintiffs argue, among other things, that they are recognized as Indian tribes by the federal government and that the federal government has had a continuous relationship with them for a great number of years.

Based on affidavits by federal government officials that have been submitted to the court, there is no doubt that the federal government officially recognizes the Cayuga Nation of New York and the Seneca-Cayuga Tribe of Oklahoma as Indian tribes. The government acknowledges the Cayuga Nation of New York as the same tribe with whom it entered into the 1794 Treaty of

Canandaigua,[2] and it recognizes the Seneca-Cayuga Tribe of Oklahoma as a successor tribe to the tribe with whom it treated in 1794. *See* Rainbolt Affidavit attached to Plaintiffs' Memorandum of Law in Support of Partial Summary Judgment and Krenzke Affidavits attached to Plaintiffs' Amended and Supplemental Motion for Summary Judgment and Memorandum of Plaintiff-Intervenor Seneca-Cayuga Tribe of Oklahoma in Response to Plaintiffs' Motion for Partial Summary Judgment.

The defendants maintain, however, that federal recognition is insufficient to establish tribal status for the purposes of a Nonintercourse Act claim and that the plaintiffs must prove that they have had a continuous tribal existence since the time of the challenged conveyances to the present time. In support of their position, the defendants rely primarily on *Mashpee Tribe* v. *New Seabury Corp.*, 592 F.2d 575 (1st Cir. 1979).

That case, though, does not stand for the proposition that federal recognition is irrelevant to a determination of tribal status. The Mashpees are not recognized as a tribe by the federal government. Consequently, the court was constrained to look for other evidence of tribal status and applied several different factors in

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[2] As set forth in the court's earlier opinion in this case:

> [The Treaty of Canandaigua] acknowledged the Original Reservation retained by the Cayugas through their treaty of 1789 with New York State, and contained a promise by the United States that the land would remain theirs until the Cayugas "chose to sell the same to the people of the United States who have the right to purchase."

Cayuga Indian Nation of New York v. *Cuomo*, 565 F. Supp. 1297, 1304-05 (N.D.N.Y. 1983).

making its ultimate determination. In recognizing the importance of federal recognition, the court did state:

> Because most groups of Indians involved in litigation in the federal courts have been federally recognized Indians on western reservations, the courts have been able to accept tribal status as a given on the basis of the doctrine going back at least to *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 756-57, 18 L.Ed. 667 (1867), that the courts will accord substantial weight to federal recognition of a tribe. *See, e.g., Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370, 377 (1st Cir. 1975).

Id. at 582.

In Joint Tribal Council of the *Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370 (1st Cir. 1975), referred to above, the court was also confronted with a Nonintercourse Act claim where the plaintiff tribe lacked federal government recognition. The court proceeded to determine that the plaintiff was nonetheless still a "tribe" for purposes of a suit under the Act but did note that federal recognition would conceivably be of "great significance" in determining tribal status. *Id.* at 377.

The plaintiffs contend that the question of tribal status is a non-justiciable political question and that recognition of the tribes by the federal government is binding on the court. There is case authority in support of the plaintiffs' position. See *United States* v. *State of Washington*, 384 F. Supp. 312, 401 (W.D. Wa. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975); *United States* v. *Aam*, 670 F. Supp. 306 (W.D. Wa. 1986). In *Aam*, the court stated that "The Court must extend great deference to the political departments in determining whether Indians are recognized as a tribe. This

determination closely resembles a political question, which should not be resolved by the courts. *Baker* v. *Carr*, 369 U.S. 186, 215 [82 S. Ct. 691, 709, 7 L.Ed.2d 663] (1962)." At ——.

This court has itself recognized the importance of federal government determinations of tribal status. "The question of whether the plaintiffs are the proper parties is an issue which, as previously explained, is to be resolved whenever possible through executive determinations of tribal status." *Oneida Indian Nation of New York* v. *State of New York*, 520 F.Supp. 1278, 1301 (N.D.N.Y. 1981) (McCurn, J.), *aff'd in part and rev'd in part*, 691 F.2d 1070 (2d Cir. 1982). Moreover, in a recent First Circuit decision involving the Mashpees, that court could not have made much clearer the great deference that it gives federal government recognition of tribal status. *Mashpee Tribe* v. *Secretary of Interior*, 820 F.2d 480 (1st Cir. 1987). The court initially discussed the history of the litigation and that a jury had found, as a matter of fact, that the Mashpees are not a tribe. The court went on, though, to refer to the "difficulty" in the Mashpees' case that resulted from the lack of federal executive or legislative branch recognition. *Id.* at 484. The court cited with approval the standard for federal recognition set forth by Professor Cohen,[3] and going even further, looked to a recently

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[3] Normally a group will be treated as a [tribe or a] "recognized" tribe if (a) Congress or the Executive has created a reservation for the group by treaty, agreement, statute, executive order, or valid administrative action; and (b) the United States has had some continuing political relationship with the group.

Mashpee Tribe v. *Secretary of Interior*, 820 F.2d 480, 484 (1st Cir. 1987) [citing F. Cohen, Handbook of Federal Indian Law at 6

published federal government list of recognized Indian tribes as evidence of tribal status. *Id.* While the Mashpees and four other "tribes" involved in that litigation are not on the list, the Cayuga Nation of New York and the Seneca-Cayuga Tribe of Oklahoma are listed. 51 Fed. Reg. 25115 (July 10, 1986).

Future court decisions may lead to a clear rule that the issue of tribal status is a political determination that binds the courts. As noted, there is some authority for that proposition at this time. However, even if a court is not bound by federal government recognition of a tribe, such recognition should be given great weight in any determination of tribal status. Notwithstanding the defendants' protests and presentation to the court of "questions of material fact" on the issue of tribal status, the court has little hesitation in holding that there is no genuine issue of material fact regarding the tribal status of either of the plaintiffs. The court concludes that, for the purposes of a Nonintercourse Act suit, tribal status of the Cayuga Nation of New York and the Seneca-Cayuga Tribe of Oklahoma has been established as a matter of law.

The second requirement in an action based on an alleged Nonintercourse Act violation is that the land in question must be covered by the Act as tribal land. There appears to be no dispute that the land under consideration in this case, that conveyed in 1795 and 1807, is covered by the Act as tribal land, and the court so concludes as a matter of law.

Similarly, advancing to the fourth requirement for a Nonintercourse Act suit, there is no argument re-

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(1982)]. The plaintiffs in the instant action meet the above-quoted test.

garding the existence of a trust relationship between the federal government and the plaintiff tribes. Obviously, the defendants have implicitly challenged any relationship with the tribes by challenging the existence of the tribes themselves. However, they have not addressed themselves specifically to the issue of a trust relationship. The affidavits by federal government officials mentioned earlier leave no doubt that the requisite trust relationship does exist, and the court concludes that this requirement has been met.

The third, and at this point, crucial requirement that the plaintiffs must meet is to establish that the federal government did not consent to the 1795 and 1807 conveyances. As stated in the Act itself, no conveyance is valid unless made by a treaty or convention entered into pursuant to the Constitution. 25 U.S.C. § 177. Not surprisingly, the plaintiffs and the defendants maintain quite different positions on just how literally the language of the statute should be read.

The defendants contend that federal government consent to the alienation of tribal land, by ratification of a land conveyance, need not be in the form of an express federal treaty or convention made by the President with the consent of the Senate. Further, the defendants contend that ratification need not be explicit.

Addressing the second point first, the Supreme Court has unequivocally held that congressional intent to terminate title to Indian land must be plainly and unambiguously expressed. *Oneida County, N.Y.* v. *Oneida Indian Nation of New York State*, 470 U.S. 226, 247-48, 105 S. Ct. 1245, 1258-59, 84 L.Ed.2d 169 (1985). It is difficult, if not impossible, for the court to envision instances where implicit federal government ratifica-

tion will be plain and unambiguous. As held in *Oneida Indian Nation of New York* v. *County of Oneida*," Termination of Congressional responsibility under the Nonintercourse Act must be explicit." 434 F. Supp. at 538. Further, Justice Brennan has stated, "[I]nterests in Indian lands can be conveyed only pursuant to explicit congressional authorization." (footnote omitted). *Mountain States Telephone & Telegraph Company* v. *Pueblo of Santa Ana*, 472 U.S. 237, 257-58, 105 S. Ct. 2587, 2599, 86 L.Ed.2d 168 (1985) (Brennan, J., joined by Marshall, J. and Blackmun, J., dissenting). The court is unwilling to accept the defendants' argument that implicit congressional ratification will satisfy the requirements of the Act.

As for the defendants' first point on this issue, stating that federal government ratification of a conveyance of Indian land must be plain and unambiguous, as well as explicit, does not necessarily answer the question of whether such ratification must be by express federal treaty. At least one court has held that any conveyance of Indian land must be by an express treaty or convention made by the President with the consent of the Senate. *Mashpee Tribe* v. *Watt*, 542 F. Supp. 797, 805 (D. Mass. 1982), *aff'd*, 707 F.2d 23 (1st Cir. 1983).

Further, the Supreme Court itself has touched upon this question. In *Oneida County, N.Y.* v. *Oneida Indian Nation of New York State*, the Court addressed the issue of ratification of conveyances of Indian land. Confronted with the argument that there was language in two different treaties, one entered into in 1798 and the other in 1802, that served to ratify conveyances that occurred in 1795, the Court held that neither treaty evidenced an intent by either the Senate or the Pre-

sident to ratify the conveyances. 470 U.S. at 248, 105 S. Ct. at 1259. The Court stated that the language in the treaties that purportedly served to ratify the conveyances was neither plain nor unambiguous. *Id.* Although it could have, however, the Court did not set down an unequivocal rule that any conveyance of Indian land must be by express federal treaty in order to comply with the Nonintercourse Act. Thus, the question of the form that ratification must take is, at least in this court's view, not completely settled.[4]

Arriving at the uncertain answer that a conveyance of Indian land may require a treaty made by the President with the consent of the Senate is not of tremendous assistance in resolving the issues before the court at this time. Although the parties are in vehement disagreement on the issue of whether ratification of the 1795 and 1807 conveyances occurred, they do not appear to disagree on the issue of whether the conveyances were accomplished by treaties made by the President with the consent of the Senate. Stated simply, the record is completely void of any indication that the President made the 1795 and 1807 treaties with the consent of the Senate.

Thus, if it is ultimately decided that such requirements must be met before a valid conveyance of Indian

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[4] The plaintiffs argue that ratification cannot occur subsequent to the conveyances. However, that the Supreme Court, in *Oneida County, N.Y.* v. *Oneida Indian Nation of New York State*, 470 U.S. 226, 105 S. Ct. 1245, 84 L.Ed.2d 169 (1985), was examining language in 1798 and 1802 treaties to determine if there was any ratification of conveyances that occurred in 1795 lends strong support to the defendants' position that ratification need not occur contemporaneously with the conveyances. *See id.* at 246-48, 105 S. Ct. at 1258-59.

land can be made, then the plaintiffs have established a prima facie case of a violation of the Nonintercourse Act.

However, because the court, at least at the present time, is not completely convinced that there must always be an express federal treaty in order to validly convey Indian land, it deems it wise to determine if there were any acts or circumstances surrounding the conveyances that could lead to a finding of plain and unan biguous ratification.

Having said that, the court is constrained to note that the evidence that it has examined in this regard does not favor the defendants. The defendants point to the involvement of federal officers Israel Chapin and Jasper Parrish with the 1795 treaty and Jasper Parrish with the 1807 treaty. Further, the defendants argue that the 1838 Treaty of Buffalo Creek served to ratify the 1795 and 1807 conveyances. The plaintiffs make several cogent arguments as to why none of the circumstances surrounding the conveyances evidence ratification on the part of the federal government, and in *Oneida Indian Nation of New York* v. *County of Oneida*, the court discussed the specious nature of the argument regarding the Buffalo Creek Treaty. 434 F. Supp. at 538-40. What must be remembered at all times, and is worth repeating, is that ratification must be plain and unambiguous, as well as explicit.

The court is quite cognizant, though, that at this stage of the proceedings, its role is not to weigh the evidence, but to determine whether there are any genuine issues of material fact. The court concludes that the defendants have demonstrated the existence of open questions of material fact that should be resolved before a final determination in this action is reached.

Particularly in a case with the wide-ranging ramifications of this one, the development of a complete factual record regarding the circumstances of the conveyances will serve to facilitate a more accurate, and thus, more just, resolution.

Additionally, although it perhaps does not directly rebut the establishment of a prima facie case of a Nonintercourse Act violation, the defendants have presented some support for an argument that the plaintiffs abandoned the land in question before the conveyances took place. *See Williams* v. *City of Chicago*, 242 U.S. 434, 37 S. Ct. 142, 61 L.Ed. 414 (1917); *United States* v. *Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 354, 62 S. Ct. 248, 255, 86 L.Ed. 260 (1941). The plaintiffs' only response to this argument is that they did not raise this point in their motion for summary judgment and that it is inappropriately addressed at this time. Since both sides are moving for summary judgment, the court cannot imagine just what the appropriate time to address this defense might be. What the court can conclude at this time is that the defendants have sufficiently raised issues of material fact regarding alleged abandonment by the plaintiffs and that this issue cannot be resolved by summary judgment.

As for the plaintiffs' motion for partial summary judgment, then, the court reiterates its holding that the plaintiffs have met the first, second, and fourth requirements for the establishment of a prima facie case of a Nonintercourse Act violation. The court concludes, however, that further factual development is needed on the issues of ratification of the conveyances and the alleged abandonment by the plaintiffs of the land in question.

II.

The defendants' motions for summary judgment are premised on several grounds, which the court will attempt to address in order.

The defendants' initial point is that the plaintiffs are barred, by the doctrine of election of remedies, from pursuing their Nonintercourse Act action in this court. In 1906, the Cayuga Nation of New York petitioned the State of New York, in the form of what is known as a memorial, for additional consideration for the land conveyed in 1795 and 1807. In 1913, a settlement was reached for approximately $247,600, and a trust was established by the State on behalf of the Cayuga Nation. According to the defendants, that trust had a principal of over $433,000 in 1972.

Further, in 1951, the Seneca-Cayuga Tribe of Oklahoma petitioned the Indian Claims Commission of the federal government (ICC or the Commission) for additional consideration for the 1795 and 1807 conveyances. In 1974, there was a trial on the liability issue which occurred after a lengthy litigation process that included an earlier trial and a remand by the United States Court of Claims. The ICC found in favor of the Seneca-Cayugas, and in 1975, a settlement was reached between that tribe and the federal government for just over $70,000. In 1977, the settlement was approved; in 1978, there was a final judgment incorporating the settlement; and in 1983, a fund distribution plan was approved by Congress. The defendants assert that each tribe has elected its remedy, and the plaintiffs

cannot now come before this court for the proverbial "second bite of the apple."[5]

The doctrine of election of remedies is given little, if any, validity in federal practice; see *Carbone* v. *Gulf Oil Corp.*, 812 F.2d 1416, 1421 (T.E.C.A. 1987); and under any circumstances is considered a harsh doctrine that is not favored. *Quinn* v. *DiGiulian*, 739 F.2d 637, 644 (D.C. Cir. 1984). In order to apply the doctrine, there must be: (1) the existence of two or more remedies; (2) the inconsistency of such remedies; and (3) a choice of one of them. *Davis* v. *Rockwell International Corp.*, 596 F. Supp. 780, 787 (N.D.Oh.1984).

What must not be lost sight of in this discussion is that any conveyance of land in contravention of the dictates of the Nonintercourse Act is invalid, as if it did not occur at all. Because either plaintiff tribe sought additional consideration for the land, or even received such consideration, does not place an imprimatur of validity on the conveyances. The receipt of additional monies is of no bearing on the issue of whether there was compliance with the Act.

Therefore, even if the doctrine of election of remedies were generally accepted in federal practice, which it is not, the court concludes that it is inapplicable here. Neither plaintiff was afforded a true choice of remedies, as the receipt of additional consideration is no remedy at all for an invalid conveyance of land.[6] The court thus

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[5] This election of remedies argument, on which one group of defendants in particular devotes a great deal of energy, differs little from an argument based on res judicata.

[6] The defendants do contend that the Indian Claims Commission was in a position to rule on the validity of the conveyances and

finds no merit to the defendants' argument based on the doctrine of election of remedies.[7]

The defendants' next argument is that the court lacks subject matter jurisdiction over this action, because the Indian Claims Commission provided the exclusive forum to resolve disputes regarding the validity of the conveyances. The ICC, which is no longer in existence, was created by Congress to resolve Indian claims against the United States. 25 U.S.C. § 70a *et seq.* There is no mention in the statute of the Commission having any jurisdiction to hear claims against non-federal parties.

In support of their argument, the defendants rely on three cases: Oglala Sioux Tribe of the *Pine Ridge Indian Reservation* v. *Homestake Mining Co.*, 722 F.2d 1407 (8th Cir.1983); *Oglala Sioux Tribe of the Pine Ridge Indian Reservation* v. *United States*, 650 F.2d 140 (8th Cir.1 981); and *Navajo Tribe of Indians* v. *State of New Mexico*, No. 82-1148-JB, slip op. (D.N.M. Jan. 23, 1984), aff'd, 809 F.2d 1455 (10th Cir. 1987). These cases differ from the instant one in several respects. Most notable, though, is that the defendants in all three cases were the United States and other parties that derived their title to the land in question directly from the United States. Those facts prompted the courts to hold that the ICC was the exclusive forum for the resolution of the disputes and, in *Navajo Tribe of Indians* v. *State of New Mexico*, that the United States was an indispensable party. Slip op. at 6.

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in fact did so, at least as to the 1807 conveyance. As will be discussed presently, this contention is not well taken.

[7] Should the plaintiffs ultimately prevail on the issue of liability, that they received additional consideration for the land in question may become pertinent to the issue of damages.

There is no question that, in the case sub judice, the defendants did not derive title to the disputed land directly from the United States, and there is no basis upon which to hold that the United States is an indispensable party.[8] *See Oneida Indian Nation of New York* v. *County of Oneida*, 434 F. Supp. at 544-45. The court in that case also stated that:

> A more important question, whether the Indian Claims Commission was created to provide an exclusive remedy for redress of wrongs to the Indian nations, was not raised by the defendants but deserves comment. . . . The legislative history makes clear that the Commission was to consider only claims against the United States; no intent to supplant Indian claims against other parties, governmental or private, is evidenced.

434 F. Supp. at 531 n. 9.[9] The court therefore concludes that it does not lack subject matter jurisdiction over the instant action.

The defendants further assert in support of their motions for summary judgment that the proceedings before the Indian Claims Commission served to create a preclusive bar to the action in this court. There are two main doctrines of preclusion, res judicata and collateral estoppel.[10] Res judicata has been defined as follows:

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[8] The United States has filed an amicus brief in this action on the issue of tribal status of the plaintiffs.

[9] The defendants maintain that the court's statement regarding the congressional purposes in creating the Indian Claims Commission was "merely" dicta. Dicta or not, this court agrees with the statement.

[10] The defendants at times indiscriminately mix the doctrines of res judicata and collateral estoppel.

> The principle of res judicata bars a subsequent suit between the same parties or their privies where a prior action has resulted in a judgment on the merits of the same cause of action. Res judicata prevents the subsequent litigation of any defense or ground for recovery that was available to the parties in the original action, whether or not it was actually litigated or determined.

Tucker v. *Arthur Andersen & Co.*, 646 F.2d 721, 727 (2d Cir. 1981); see also *National Association of Pharmaceutical Manufacturers* v. *Department of Health and Human Services*, 586 F. Supp. 740 (S.D.N.Y. 1984). Clearly, none of the defendants in this district court action, nor their privies, were defendants in the ICC action.[11] Moreover, as the court has already concluded that the ICC was created to resolve claims against the United States, the plaintiffs could not have proceeded against non-federal defendants, at least not against those who did not derive title directly from the United States, in that forum. Therefore, res judicata does not serve as a bar to this federal court action.[12]

While res judicata involves claim preclusion, collateral estoppel involves issue preclusion:

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[11] The Cayuga Nation of New York also argues that it was not in privity with the Seneca-Cayuga Tribe of Oklahoma in the Indian Claims Commission proceeding. The court concludes that there are open questions of fact in that regard, but that issue is irrelevant to the court's determination at this time.

[12] The court also notes the existence of a statutory res judicata bar to Indian Claims Commission decisions. 25 U.S.C. § 70u(b); *United States* v. *Dann*, 706 F.2d 919, 923-25 (9th Cir.1983), *rev'd on other grounds*, 470 U.S. 39, 105 S. Ct. 1058, 84 L.Ed.2d 28 (1985). However, as that bar applies only to claims against the United States, it has no bearing in the instant case.

> The doctrine of collateral estoppel . . . normally will bar the relitigation of an issue of law or fact that was raised, litigated, and actually decided by a judgment in a prior proceeding between the parties, if the determination was essential to the judgment, regardless of whether or not the two proceedings are based on the same claim.

N.L.R.B. v. *United Technologies Corp.*, 706 F.2d 1254, 1260 (2d Cir.1983). Additionally, similarity between the issues is not sufficient; the issues must be identical. *Shapley* v. *Nevada Board of State Prison Commissioners*, 766 F.2d 404, 408 (9th Cir. 1985).

The defendants maintain that because the ICC made some findings regarding the federal government's "involvement" with the 1795 and 1807 conveyances, the issue of federal ratification has already been decided. Regarding the 1795 treaty, the Commission merely found that the federal government had knowledge of New York State's intention to purchase land from the Cayugas and that the Cayugas complained to the federal government about the fairness of the treaty. The *Cayuga Nation of Indians* v. *United States*, Docket No. 343, 36 Ind. Cl. Comm. 75, 79 (1975). As for the 1807 treaty, the Commission found again that the federal government had knowledge of the treaty, and the Commission also found that a government representative was involved in the treaty negotiations and was present at the signing. *Id.* at 80.

The court has already held that the development of a full factual record regarding the circumstances of the conveyances is in order. The findings of the ICC may eventually have some pertinence in that regard. Those findings, however, standing alone, do not support the conclusion that there was plain, unambiguous, and

explicit ratification of either the 1795 or 1807 conveyance. The issue of federal government ratification was not before the ICC. It was not raised; it was not litigated; and it was not essential to the ICC's decision. Thus, collateral estoppel does not bar this court's determination of the issue of federal government ratification of the conveyances.

Consequently, the court refuses to leapfrog to the next conclusion that the defendants would have it reach. The conclusion is that, because the 1807 treaty between the Cayugas and the State of New York has already been found "valid," then the 1795 treaty must be considered "valid" as well. The 1807 treaty has certainly not been found valid, and even if it were, the court is not convinced at this point in time that its validity would serve to automatically ratify the 1795 treaty.

The defendants' final contention in support of their motions is that, because the Indian Claims Commission was created by Congress, and because it resolved the claim of the Seneca-Cayuga Tribe of Oklahoma for additional consideration, it ratified the 1795 and 1807 land conveyances. The defendants have again lost sight of the fact that federal ratification must be plain, unambiguous, and explicit. An award by the Commission need not be based on a finding of validity of the conveyances themselves.[13] See *United States* v. *Oneida Nation of New York*, 576 F.2d 870, 882 n. 26 (Ct. Cl. 1978). Even if such a presumption of validity could be

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[13] As noted, the additional consideration received by the Seneca-Cayuga Tribe of Oklahoma was not so much by award as by settlement.

made, the ratification by the Commission would be implicit, not explicit.

Further, that the Commission was created by Congress did not give it inherent ratification power. Such a contention was presented to the court in *Oneida Indian Nation of New York* v. *County of Oneida*, No. 79-7685 (N.D.N.Y. May 17, 1979). In refuting the contention, the court held that, had Congress wanted to provide the ICC with ratification power, it could have done so, but it did not.[14] Transcript at 74-97. The court agrees with that holding and finds no merit to the defendants' argument regarding the ratification power of the Indian Claims Commission.

Accordingly, for the reasons adduced in this opinion, the plaintiffs' motion for partial summary judgment and the defendants' motions for summary judgment are denied. Further proceedings will be limited to the issues of federal government ratification and alleged abandonment by the plaintiff tribes as discussed herein.

IT IS SO ORDERED.

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[14] The Supreme Court has made clear that it will examine congressional intent quite carefully when interpreting statutes that allow for the alienation of Indian land. In *Mountain States Telephone & Telegraph* v. *Pueblo of Santa Ana*, 472 U.S. 237, 105 S. Ct. 2587, 86 L.Ed.2d 168 (1985), the Court had occasion to examine a statute that allowed for the alienation of Pueblo Indian land. That statute provides for approval by the Secretary of Interior. Notwithstanding that the remaining language in the statute is almost identical to that contained in the Nonintercourse Act, the Court noted that the difference between approval by the Secretary of Interior and ratification by Congress is "significant." *Id.* at 250-51, 105 S. Ct. at 2595-96.

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

Nos. 80-CV-930, 80-CV-960

THE CAYUGA INDIAN NATION OF NEW YORK, BY ITS CHIEFS, FRANKLIN PATTERSON, JAMES LEAFFE, VERNON ISAAC, KENNETH JOHN, AND FRANK BONAMIE, INDIVIDUALLY AND AS MEMBERS OF THE CAYUGA INDIAN NATION OF NEW YORK, PLAINTIFFS

AND

THE SENECA-CAYUGA TRIBE OF OKLAHOMA, PLAINTIFF-INTERVENOR

v.

MARIO M. CUOMO,* AS GOVERNOR OF THE STATE OF NEW YORK; THE STATE OF NEW YORK; MILLER BREWING COMPANY; THE COUNTY OF CAYUGA, NEW YORK; CONSOLIDATED RAIL CORPORATION; DAVID L. KOCH; GEORGE G. SOUHAN; THE COUNTY OF SENECA, NEW YORK; AND NEW YORK STATE ELECTRIC AND GAS CORPORATION, INDIVIDUALLY AND AS REPRESENTATIVES OF ALL OTHERS SIMILARLY SITUATED, DEFENDANTS

THE CAYUGA INDIAN NATION OF NEW YORK, BY ITS CHIEFS, FRANKLIN PATTERSON, JAMES LEAFFE, VERNON ISAAC, KENNETH JOHN, AND FRANK BONAMIE, INDIVIDUALLY AND AS MEMBERS OF THE CAYUGA INDIAN NATION OF NEW YORK, PLAINTIFFS

AND

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* Pursuant to Rule 25(d)(1) Mario M. Cuomo is substituted for Hugh L. Carey as defendant in this action.

THE SENECA-CAYUGA TRIBE OF OKLAHOMA,
PLAINTIFF-INTERVENOR

v.

WILLIAM J. KIRK, GAIL KIRK, HENRY W. KOCH,
BARBARA F. KOCH, ROBERT MAIER,
CHARLES HITCHCOCK, PHILO BACON, WILMA
ANTHONY, DANIEL A. DEPASQUALE,
ALICE M. DEPASQUALE, RICHARD HILL, AND
VIRGINIA HILL, DEFENDANTS

May 26, 1983
As Amended Sept. 19, 1983

MEMORANDUM-DECISION AND ORDER

MCCURN, District Judge.

The Cayuga Indian Nation and five chiefs of that tribe seek a declaration of their current ownership of and right to possess a 64,015 acre tract of land in central New York State, an award of fair rental value for the almost 200 years during which they have been out of possession, and other monetary and protective relief. The Cayugas allege that this tract is reserved for their tribe by treaties with both the United States and the State of New York, and has been subject to a restraint against alienation under the Nonintercourse Act, now codified at 25 U.S.C. § 177. Though the tract was conveyed to the State through transactions in 1795 and 1807, and thereafter conveyed, in large part, to private purchasers, the Cayugas claim that under federal law their right to possession has never been extinguished.

This suit is one of a recent series of land claims brought by eastern Indian tribes in the federal courts.[1] Such claims have imposed upon the courts the painful task of determining whether, and how, federal commitments to tribes are to be enforced against states, against municipalities, and against innocent non-Indians who have for generations considered the land their own. Most of the claims, like this one, challenge the validity of conveyances by the tribes which occurred after the adoption of the Constitution, and after the enactment of the first Nonintercourse Act. Although as of this date only one such claim has reached a final judgment for the plaintiffs, *Oneida Indian Nation of New York v. County of Oneida*, 70-CV-35 (N.D.N.Y. Oct. 5, 1981) (Port, J.), *appeals docketed*, (2d Cir. June 11, 1982; June 24, 1982), others have withstood a variety of challenges to the jurisdiction of the court and the legal sufficiency of the complaint.

For example, it has been established that a claim asserting a possessory right conferred by treaty and protected by the Nonintercourse Act is within the subject matter jurisdiction of the federal court, *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661, 94 S. Ct. 772, 39 L. Ed. 2d 73 (1974); that the claim may be maintained by any bona fide Indian tribe, *Joint Tribal Council of the Passamaquoddy Tribe v.*

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[1] It is likely that this recent surge of tribal land claims was prompted, in large part, by the enactment of 28 U.S.C. § 2415 which, as amended, set a deadline of December 31, 1982 for the filing of certain claims. For a discussion of other factors in the revival of these long-dormant claims, see Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 *Me. L. Rev.* 17, 47-49 (1979-80).

Morton, 528 F.2d 370, 377 (1st Cir. 1975); *Narragansett Tribe of Indians v. So. R.I. Land Devel. Corp.*, 418 F. Supp. 798, 808 (D.R.I. 1976); and may be maintained without joinder of the federal government, *Narragansett Tribe of Indians v. So. R.I. Land Dev. Corp., supra*, 418 F. Supp. at 810-813; that defenses based upon state law such as adverse possession, statutes of limitation, laches, or estoppel by sale are unavailable to the defendants, *Mohegan Tribe v. State of Connecticut*, 638 F.2d 612, 615 n.3 (2d Cir. 1980); *Oneida Indian Nation v. County of Oneida*, 434 F. Supp. 527, 541-44 (N.D.N.Y. 1977); *Schaghticoke Tribe of Indians v. Kent School Corp.*, 423 F. Supp. 780, 783-85 (D. Conn. 1976); *Narragansett Tribe of Indians v. So. R.I. Land Devel. Corp., supra*, 418 F. Supp. at 803-06; that the Nonintercourse Act was meant to apply throughout the United States and not only to land in "Indian Country", *Mohegan Tribe v. State of Connecticut, supra*, 638 F.2d 612; and is not geographically limited by the "surrounded by settlements" exception in the Trade and Intercourse Acts. *Narragansett Tribe of Indians v. So. R.I. Land Devel. Corp., supra*, 418 F. Supp. at 808-809.

Further instruction on the maintainability of tribal land claims has recently appeared in a Second Circuit decision reviewing the dismissal of one such action by this Court. *Oneida Indian Nation of New York v. State of New York*, 691 F.2d 1070 (2d Cir. 1982), *aff'g in part and rev'g in part Oneida Indian Nation of New York v. State of New York*, 520 F. Supp. 1278 (NDNY 1981). Although *Oneida* largely concerned a pre-constitutional claim (it was alleged that conveyances in 1785 and 1788 were invalid under Article IX, clause 4 of the Articles of Confederation), the Court's discussion of the availability of particular defenses is largely applicable to any

tribal claim which asserts the nonalienability of Indian land under federal law. Thus it is pertinent here that the Second Circuit reject~~ed~~ in *Oneida* defenses based on the Eleventh Amendment immunity of states, *id.* at 1079-80, the nonjusticiability doctrine, *id.* at 1080-1083, state time-bars, *id.* at 1083-84, and federal time-bars, *id.* at 1084.

Presently before the Court are further challenges to jurisdiction and the legal sufficiency of a tribal land claim. These challenges are raised by means of (1) a joint motion by the Counties of Cayuga and Seneca, Miller Brewing Company, Consolidated Rail Corporation, and New York State Electric and Gas Corporation (hereinafter "the non-state defendants"), who appear individually and as representatives of the defendant class, to dismiss the complaint pursuant to Rules 12(b)(1) and (6), Fed. R. Civ. P., and (2) a motion by the State of New York and Governor Carey (hereinafter "the state defendants"), also individually and as representatives of the defendant class, to dismiss the complaint pursuant to Rules 12(b)(1), (2) and (6), Fed. R. Civ. P.

The arguments raised by the defendants in support of their motions are, to a large extent, variants of arguments presented to this and other courts in previous tribal land claim litigation. *E.g.*, sovereign immunity, nonjusticiability, statutes of limitations, geographic nonapplicability of the Nonintercourse Act, equitable defenses. These have invariably been rejected in such cases and must be rejected in this case as well. The defendants have advanced other arguments herein which lead the Court into less well-charted territory. *E.g.*, unavailability of an implied right-of-action under the Nonintercourse Act or of a federal common law

remedy, abatement of statutory claims. However, for the reasons stated below, these relatively new contentions do not warrant dismissal of the complaint.

I. THE PARTIES

A. The Plaintiffs

The plaintiff Cayuga Indian Nation of New York asserts that it is an Indian Nation or Tribe recognized by the United States and principally situated in New York State, though without a reservation. Its members maintain that they are the "direct successors in interest" to the Cayuga Nation of the Six Nation Iroquois Confederacy which, until the acts complained of in this suit, had occupied the subject land in New York State since time immemorial. They state that tribal relations have been continuously maintained to the present time.

By *Memorandum-Decision and Order* of November 9, 1981, the Court granted a motion by the Seneca-Cayuga Tribe of Oklahoma to intervene as a plaintiff in this suit, pursuant to Rule 24, Fed. R. Civ. P. The Seneca-Cayuga Tribe had established sufficient interest in the action for the purpose of intervention by their allegations that, at the time of the challenged transactions, it had been "incorporated within and was a part of the Cayuga Nation of Indians." According to the Intervenor, the Cayugas split into two branches after they lost their Original Reservation to New York State. One branch settled in Western New York State, and is, apparently, the branch represented by the Cayuga Indian Nation of New York. The Intervenor Seneca-Cayuga Tribe purports to represent the other, larger branch of the Cayugas, which had moved first to Ohio, then to "Indian Territory" (now Oklahoma). The Order permitting intervention does not impair the right of the

plaintiff Cayuga Indian Nation of New York or the defendants to challenge the Intervenor's entitlement to a share of the recovery from this lawsuit, if any is ultimately awarded.[2]

B. The Defendants

The initial complaint in this action, filed November 19, 1980, named numerous defendants sued individually and as representatives of a proposed class of "all other persons who assert an interest in any portion of the Original Reservation lands. . . . " *Complaint* ¶ 25. Those named included the Governor of New York, numerous administrative agencies, authorities and officials, the Counties of Cayuga and Seneca, various local governmental entities and officials, and various commercial and individual landowners. Plaintiffs have estimated the number of persons asserting an interest in the land as exceeding 7,000 individuals and entities.

On December 1, 1980, the plaintiffs commenced a second action, *Cayuga Indian Nation v. William J. Kirk, et al*, 80-CV-960, asserting the same legal claim against twelve individual owners of land in the contested area. By *Memorandum-Decision and Order* of March 25, 1981, 89 F.R.D. 627, this Court ordered the consolidation of the two actions brought by the Cayugas, pursuant to Rule 42(a), Fed. R. Civ. P.

By that same *Memorandum-Decision and Order*, as amended, this Court certified a defendant class,

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[2] Although plaintiff Cayuga Indian Nation of New York and the plaintiff-intervenor Seneca-Cayuga Tribe have submitted separate briefs in opposition to the motions to dismiss, the briefs are similar enough to permit the Court to treat them collectively in this opinion, by referring to the allegations or arguments of "the plaintiffs" or "the Cayugas".

pursuant to Rule 23(b)(1)(B), Fed. R. Civ. P., for the purpose of litigating certain specified but key issues in this lawsuit. After notice to the class and a hearing, at which several individuals and a corporation lodged objections to the certification, all objections were overruled and a motion to decertify the class was denied. *Order* of March 31, 1982. A list of those named defendants who have been designated as representatives of the class for the purpose of this motion appears in the title of this decision.

II. FACTUAL ALLEGATIONS

Plaintiffs allege that from time immemorial until the late eighteenth century the Cayuga Nation owned and occupied over 3,000,000 acres in what is now central New York State. They produce as an exhibit to their complaint in 80-CV-930 a map indicating a strip of land, about 50 miles wide, running from Lake Ontario to the Pennsylvania border; the strip is labeled "Cayuga Aboriginal Land Area". The present suit is not an assertion of possessory rights to the entire Aboriginal Land Area, but to a portion thereof which was purportedly reserved for the Cayugas, then lost, in the course of the events alleged below.

During the colonial period in our history, the British Crown pursued a policy of protecting Indian tribes in the peaceful protection of their land. In furtherance of this policy, a treaty was concluded in 1768 at Fort Stanwix, establishing a boundary between the American colonies and the Six Nations—an Indian confederation comprised of the Oneida, Tuscarora, Mohawk, Onondaga, Cayuga and Seneca Nations. Plaintiffs state that a portion of this boundary corresponded to a portion of the eastern boundary of the Cayuga aboriginal territory.

At the conclusion of the American Revolution, Congress assumed authority over relations with Indians, pursuant to Article IX, clause 4 of the Articles of Confederation.[3] In exercise of its new authority, and allegedly to promote peaceful relations with the Indian tribes, Congress issued a Proclamation in 1783 which reiterated its "sole and exclusive", but qualified, right to regulate trade and manage affairs with Indians. In addition, it prohibited the purchase of or settlement on certain Indians' lands without the express authority and direction of the federal government.

The following year, federal commissioners met with the Six Nations and concluded the Treaty of Forth Stanwix, 7 Stat. 15 (1784). Article II of the Treaty delineated the boundaries of the Six Nations, including the boundary of the Cayuga Nation.

Notwithstanding the federal restrictions under the Articles of Confederation, the Proclamation of 1783 and the 1784 Treaty of Fort Stanwix, the State of New York concluded a treaty with the Cayuga Indian Nation on February 25, 1784 in Albany; the Cayugas thereby relinquished all of their lands to New York, reserving for their own tribal use the 64,015 acres that is the subject of this action. This remaining area, referred to

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[3] The Articles of Confederation, Art. 9 cls. 1, 4, provides in pertinent part:

> The United States in Congress assembled shall have the sole and exclusive right and power of determining on peace and war . . . entering into treaties and alliances . . . .
>
> The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated.

by the Cayugas as the "Original Reservation", is depicted on the map attached to the complaint as two swaths of land on the eastern and western shores at the northern end of Cayuga Lake.

Less than a week later, on March 2, 1784, the United States Government under the Constitution commenced. *See, Oneida Indian Natin of New York* v. *State of New York*, 520 F. Supp. 1278, 1323 (NDNY 1981).

In 1790, Congress enacted the first in a series of Trade and Intercouse Acts, *Act of July 22,1 790*, ch. 33, 1 Stat. 137, pursuant to Cognress' authority under Article I, § 8, clause 3 of the Constitution. Section four of that Act constituted the first Nonintercourse Act. It provided:

> . . . That no sale of lands made by any Indians or any nation or tribe of Indians within the Untied States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made or duly executed at some public treaty, held under the authority of the United States.

The Trade and Intercourse Act of 1790, which included the above-quoted Nonintercourse Act, was a temporary measure, and expired in 1793. It was replaced by the Trade and Intercourse Act of 1793, *Act of March 1, 1793*, ch. 19, 1 Stat. 329, which in Section 8, contained a revised Nonintercourse Act:

> . . . That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the Constitution. . . .

The Act went on to establish penalties for its violation, and to carve certain exceptions to its coverage. The "non-alienability clause" set forth above has remained substantially the same through successive re-enactments of the Act, and is now codified at 25 U.S.C. § 177.

The Cayugas next state that on November 11, 1794, the Six Nations concluded another treaty with the United States at Canandaigua. This treaty, 7 Stat. 44, acknowledged the Original Reservation retained by the Cayugas through their treaty of 1789 with New York State, and contained a promise by the United States that the land would remain theirs until the Cayugas "chose to sell the same to the people of the United States who have the right to purchase."

We are then told that on June 16, 1795, William Bradford, then Attorney General of the United States, issued an opinion on the question of whether the State of New York had a right to purchase land from the Six Nations or from any of the individual tribes without the participation of the federal government. The Attorney General concluded that, under the Nonintercourse Act of 1793, no sale of land by an Indian tribe was valid, nor could the claims of the New York Indians be extinguished, except by a treaty entered into by the federal government.

On July 27 of that same year, however, while the Nonintercourse Act of 1793 was still in effect, a treaty was entered into at Cayuga Ferry, New York, by which New York State acquired the entire Cayuga reservation except for a three mile parcel on the eastern shore of Cayuga Lake. As consideration, the state agreed to pay the Cayuga Nation $1,800 annually in perpetuity.

Plaintiffs allege that the treaty negotiations were conducted by state officials without the consent and approbation of the federal government. A federal official, Israel Chapin, was among those who signed the treaty on July 27 as a witness, but he purportedly informed the Secretary of War Pickering shortly thereafter that he had attended the treaty signing as a private individual and not as a commissioner representing the United States.[4]

The Nonintercourse Act was re-enacted in 1796, *Act of May 19, 1796*, ch. 30, 1 Stat. 469, § 12; in 1799, *Act of March 3, 1799*, ch. 46, 1 Stat. 743 § 12; and in 1802, *Act of March 30, 1802*, ch. 13, 2 Stat. 139 § 12. In 1807, during the effective period of the 1802 Act, New York State purchased the remaining three mile parcel held by the Cayugas for $4,800. Plaintiffs allege that this conveyance, too, was without the consent and approbation of the federal government.

III. PLAINTIFFS' CLAIM

Plaintiffs have styled their suit "a defendant class action to declare plaintiffs' current ownership of and right to possess certain lands in the State of New York . . . the right to which is conferred by federal law and

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[4] In ¶ 47 of their Complaint, plaintiffs allege that Chapin wrote again to Secretary Pickering, to inform him of a grievance expressed to him by a party of Cayugas from the reservation. The Cayugas allegedly explained that the land was sold out from under them; that those who signed on behalf of the Cayugas were Canadian Indians and not residents of the reservation; that the remaining three mile parcel was too small for their usage. Since plaintiffs' claim is based on the nonalienability of the parcel, and not on the unfairness of the transaction, this particular allegation is surplusage.

which is subject to restrictions against alienation."[5] *Complaint* ¶ 1. Their claim for relief assertedly arises under Article IX of the Articles of Confederation; the Proclamation of 1783; the Treaty of Fort Stanwix (1784); the Treaty of Canandaigua (1794); Article I, Section 8 of the United States Constitution (the Commerce Clause); 25 U.S.C. § 177 and its predecessor, the 1790 Nonintercourse Act, Article 37 of the 1777 New York Constitution, and the common law. Elsewhere in the Complaint, plaintiffs add that their title is protected by the Fifth and Fourteenth Amendments to the United States Constitution. *Complaint* ¶ 49.[6] With respect to the common law bases for their claim, references are made in plaintiffs' papers to "ejectment", "trespass", "waste" and "conversion", either as analogous forms of action or as indices of damages.

The Seneca-Cayugas, in their *Amended Complaint in Intervention*, at 2, invoke 42 U.S.C. § 1983 as a further statutory basis for the action.

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[5] Because of the peculiar nature of tribal land tenure, the Cayugas do not claim to hold fee title to the land, such title having been appropriated by the European sovereign upon "discovery". *See, Oneida Indian Nation of New York v. State of New York*, 691 F.2d at 1074-75. Plaintiffs' claim is to the "Indian title" or "right of occupancy", long recognized to be "good against all but the sovereign". *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. at 667, 94 S. Ct. at 777 (1976). *See, Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 5 L. Ed. 681 (1823). *See also*, note 10, *supra*.

[6] At one point in their papers, the Cayuga Indian Nation of New York refers to the action as one for "a declaratory judgment and ancillary relief." *Plaintiff's Memorandum of Law* at 7. However, the applicability of 28 U.S.C. § 2201, which authorizes that remedy, is nowhere discussed by the parties.

As is apparent, the plaintiffs are not specifying a single source for their substantive possessory right, or a single source for their right of action. However, it may be noted here that the particular theory of plaintiffs' case which has been the focus of argument and is the focus of this decision is that plaintiffs' substantive right to the subject land has been confirmed by federal and state treaties, and has been subject to the restraint against alienation in the Nonintercourse Act; that the right to maintain this action is derived from the Nonintercourse Act itself or from federal common law.

The relief sought by plaintiffs is (1) a declaration of their current ownership and right to possess the land in question; (2) an order restoring the plaintiffs to possession of the land and ejecting the defendants; (3) an accounting of all taxes paid on the land from 1795 to the present; (4) trespass damages in the amount of the fair rental value of the land since plaintiffs' dispossession; (5) establishment of a fund, comprised of all proceeds of any sales of the land in issue, for the satisfaction of trespass damages; (6) establishment of a fund, comprised of all tax proceeds collected by defendant counties for the land, for the satisfaction of trespass damages; (7) restitution for the value of all timber, oil, gas, coal, or other matter of value which has been extracted or removed from the land; and (8) establishment of a fund comprised of all future proceeds from the extraction or removal of the above natural resources.

IV. SUBJECT-MATTER JURISDICTION

The initial complaint invokes federal jurisdiction under 28 U.S.C. §§ 1331, 1337 and 1362. Plaintiff-Intervenors add § 1343(3) as the jurisdictional basis for their claim of deprivation of Constitutional and statutory rights. Having determined that the suit presents a

federal controversy brought by an Indian tribe, the Court concludes that it has jurisdiction over the subject matter of this claim pursuant to § 1331 and § 1362.

In *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661, 94 S. Ct. 772, 39 L. Ed. 2d 73 (1974) (hereinafter "*Oneida v. County of Oneida*"), the Supreme Court considered a tribal claim conceptually identical to the claim now asserted by the Cayugas. The Oneidas alleged aboriginal ownership of a vast area of what is now New York State and further alleged that their right to possess a more modest area was confirmed by treaties with the federal government, including the Treaty of Fort Stanwix (1784) and the Treaty of Canandaigua (1794). Notwithstanding these treaties, and despite the restraint on alienability in the Non-intercourse Act of 1793, a portion of the land reserved to that tribe was ceded to New York State in 1795.

The Court viewed the complaint in *Oneida v. County of Oneida* as asserting "a current right to possession conferred by federal law", *id.* at 666, 94 S. Ct. at 776, and concluded:

> Given the nature and source of the possessory rights of Indian tribes to their aboriginal lands, particularly when confirmed by treaty, it is plain that the complaint asserted a controversy arising under the Constitution, laws, or treaties of the United States within the meaning of both § 1331 and § 1362.

Id. at 667, 94 S. Ct. at 777.

Neither of the movant-defendants attempt to distinguish *Oneida v. County of Oneida* from the case at bar, or otherwise contend that its holding is inapplicable here. Instead, the defendant New York State seeks to exclude itself from the jurisdiction of this Court by

asserting sovereign immunity under the Tenth and Eleventh Amendments. That defense is addressed below, but it is noted here that the immunity of the State would at most deprive the Court of jurisdiction over the State, and not over the subject matter.

Although the non-state defendants have also moved to dismiss for lack of subject matter jurisdiction, the defenses they assert either challenge the timeliness or legal sufficiency of the complaint (statutes of limitations, equitable defenses, geographic non-applicability of the Nonintercourse Act, no right of action, abatement of statutory claims) or the justiciability of the claim, which is a *sui generis* ground for dismissal, not a jurisdictional defect. *See, Powell v. McCormack*, 395 U.S. 486, 512, 89 S. Ct. 1944, 1959, 23 L. Ed. 2d 491 ("there is a significant difference between determining whether a federal court has 'jurisdiction over the subject matter' and determining whether a cause over which a court has subject matter jurisdiction is justiciable").

Thus, none of the contentions advanced by the movants upsets our initial conclusion that the Court has jurisdiction over the subject matter of this action.

V. SOVEREIGN IMMUNITY

Defendant New York State seeks dismissal of the claim against it by reason of its sovereign immunity preserved by the Tenth Amendment or created by the Eleventh Amendment. In effect, the State requests this Court to reconsider its recent determination, in *Oneida Indian Nation of New York v. New York State*, 520 F. Supp. 1278, 1301-08 (N.D.N.Y. 1981) (hereinafter "*Oneida v. New York*"), that Congress, in enacting 28

U.S.C. § 1362, abrogated the state's Eleventh Amendment immunity from tribal suits.[7]

In the interim between the submission of papers on this motion and the issuance of this decision, that particular holding of *Oneida v. New York* was affirmed by the Second Circuit. In *Oneida v. New York*, 691 F.2d 1070 (2d Cir. 1982), the Court of Appeals stated as its premise that,

> When the states granted to Congress the power "[t]o regulate commerce . . . with the Indian tribes," U.S. Constitution, Art. I, § 8, cl. 3, they necessarily "surrendered a portion of their sovereignty," *Parden v. Terminal Railway*, 377 U.S. 184, 191 [84 S. Ct. 1207, 1212, 12 L. Ed. 2d 233] (1964), and thereby granted Congress the power to abrogate the state's immunity from suits upon claims arising out of such regulation.

Id. at 1079-80.

The Court then noted that the purpose of 28 U.S.C. § 1362, as discerned in *Moe v. Confederated Salish & Kootemai Tribes*, 425 U.S. 463, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976) was "to open the federal courts to the kind of claims that could have been brought by the United States as a trustee, but for whatever reason were not so brought." *Id.* at 1080, citing *Moe, supra*, 425 U.S. at 472, 96 S. Ct. at 1636. Satisfied that the Eleventh Amendment would not bar a suit brought by the federal government on behalf of an Indian tribe, the Court

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[7] 28 U.S.C. § 1362. *Indian tribes* The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

concluded that Congress, in enacting § 1362, "indicate[d] an intent to remove the state's 11th Amendment immunity in suits brought by tribes." *Id.* at 1080. In closing the Court specified that states are subject to monetary damages as well as declaratory and injunctive orders under § 1362.

There was no assertion of Tenth Amendment immunity in *Oneida v. New York*, as there is by the State here; however, that precise defense was recently considered, and unequivocally rejected, in *Mohegan v. Connecticut*, 528 F. Supp. 1359, 1367-69. This Court is in full agreement: there is no support for the view that the Tenth Amendment preserves any preconstitutional attributes of sovereign immunity which have not been abrogated by Congress and which would bar this type of claim. On the contrary, the rationale of the *Oneida v. New York* holding clearly applies—perhaps in even greater force—to the defense of Tenth Amendment immunity: the States implicitly granted Congress the power to abrogate their immunity with respect to Indian affairs within the scope of Congressional power under Article I; Congress exercised that power when it enacted § 1362. The explicit reservation of immunity in the Eleventh Amendment therefore cannot bar this action; *a fortiori*, any vestige of immunity under the more general Tenth Amendment would also be ineffectual.

There are, of course, some attributes of state sovereignty which are specifically protected by the Tenth Amendment from the exercise of Congressional power under the Commerce Clause. *See National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245 (1976). But the scope of such immunity is narrow, applying only where the state can show that (1) the challenged statute regulates the "States as

States," (2) the statute addresses matters that are indisputable attributes of state sovereignty; (3) compliance would impair the state's ability "to structure integral operations in areas of traditional governmental functions." *Equal Employment Opportunity Commission v. Wyoming*, 460 U.S. 226, 103 S. Ct. 1054, 1060-61, 75 L. Ed. 2d 18 (1983), *citing Hodel v. Virginia Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 286-288, 101 S. Ct. 2352, 2364, 69 L. Ed. 2d 1 (1981). It can hardly be contended, and New York does not contend, that the enforcement of the Nonintercourse Act can be avoided on immunity grounds under the *Usery* doctrine.

VI. JUSTICIABILITY

The non-state defendants have also asked this Court to renounce an aspect of its decision in *Oneida v. New York*, and hold that plaintiffs' claim is not justiciable. The argument is twofold: (A) the relief requested cannot be judicially molded, and (B) the action presents solely political questions.

A. *Availability of Relief*

Defendants have cited this Court's recognition, in *Oneida v. New York*, that "serious, if not insurmountable problems . . . would arise out of granting the plaintiffs the relief they seek," 520 F. Supp. at 1296, and that "an award of possession . . . would create utter chaos and disaster to many, socially, economically, and politically." *Id.* at 1295. They build upon these concerns by describing in their brief the more dramatic potential consequences of an award of possession: *e.g.*, the loss of homes, businesses, and municipal facilities; the transfer of sovereignty over the land and its unwilling inhabitants to the Cayuga Indian Nation and its tribal government.

The dire warnings of the defendants are not unheard by this Court, and should plaintiffs ultimately prevail the utmost circumspection and restraint will be employed in fashioning an appropriate remedy. But the fact that a particular remedy sought may be unavailable or impractical as too disruptive or unfair does not render a lawsuit unjusticiable, so long as there is some form of relief that the Court could fashion. *Cf. Powell v. McCormack*, 395 U.S. 486, 498-99, 89 S. Ct. 1944, 1951, 23 L. Ed. 2d 491 . By way of example and not prediction, it may be noted that in the one recent tribal claim to reach final judgment, plaintiffs were awarded historically adjusted monetary damages as compensation for the illegal alienation of their land. *Oneida v. County of Oneida*, *supra*, 70-CV-35 (May 5, 1982), *appeals docketed* (by plaintiffs, June 11, 1982; by defendant, June 24, 1982).

In *Oneida v. New York*, where the tribal plaintiffs sought some five million acres of New York land, this Court concluded that there were standards by which to formulate some relief should the plaintiffs establish their claim, 520 F. Supp. at 1297, and the claim was therefore justiciable. The Second Circuit upheld this Court on that point, observing that "Indian land claims have traditionally been asserted in the courts of this country for resolution." 691 F.2d at 1081. *See also, Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649, 664 (D. Me.), *aff'd*, 528 F.2d 370 (1st Cir. 1975). In the Second Circuit's view, plaintiffs' request for a declaration of its possessory rights renders the claim justiciable, even if no other relief can be devised. *Id.* at 1082, *citing Powell v. McCormack*, *supra*, 395 U.S. at 517, 89 S. Ct. at 1961. But it refused to concede that a compensatory remedy could not be

fashioned, or that "fair rental value" was an indeterminable basis for damages. Moreover, in response to an argument that the scale of the claim rendered it unjusticiable, the Court wrote, "we know of no principle of law that would relate the availability of judicial relief to the gravity of the wrong sought to be redressed." *Id.* at 1083.

Defendants assert that great disruption has already been caused by the mere filing of this suit, and will worsen over the course of what promises to be lengthy litigation. The Court is aware of this and joins with other courts and commentators in regretting that too few of the eastern tribal land claims have been resolved by legislation or negotiated settlement. *See, e.g., Oneida v. New York*, 691 F.2d at 1081-82; *Oneida v. County of Oneida*, 434 F. Supp. at 531; *Comments: Indian Land Claims Under the Nonintercourse Act*, 44 *Albany L. Rev.* 110, 134-37; Clinton and Hotopp, *supra*, 31 *Me. L. Rev.* at 89. But in the absence of such preferable solutions, access to the courts is and must be available, and the hardship inflicted upon parties *pendente lite* does not render the suit nonjusticiable.

B. *Political Question*

Defendants next contend that this action poses solely political questions and is thus nonjusticiable under *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1961). They maintain that the issues raised have been constitutionally committed to either the President or Congress, and that adjudication by the Court creates a "potential for embarrassment resulting from multifarious pronouncements by various branches of the federal government." *Baker v. Carr*, *supra*, 369 U.S. at 217, 82 S. Ct. at 710.

The identical arguments were raised by the defendants in *Oneida v. New York* and rejected, both in this Court and on appeal. In so doing, the Second Circuit observed that the political question doctrine is "'essentially a function of separation of powers'," *citing Baker v. Carr, supra* at 217, 82 S. Ct. at 710, and it concluded that:

> adjudication of Indian land claims such as the instant action is wholly consistent with the prevailing conceptions of the relationship among the three branches of government concerning the appropriate means to redress the historical wrongs committed against the Native American.

691 F.2d at 1081. The Court then added that the executive and legislative branches of the federal government have acknowledged the justiciability of such claims, and that, to its knowledge, no Indian land claim had ever been dismissed as nonjusticiable. *Id.* at 1081-82.

In light of the Second Circuit decision in *Oneida v. New York*, it can no longer be seriously maintained that tribal land claims are nonjusticiable due to the difficulty of molding relief or due to the possible strain on our political concept of the separation of governmental powers.

VII. STATUTE OF LIMITATIONS

The two transactions which are challenged in this lawsuit occurred over 1 3/4 centuries ago. One might expect that the term of some applicable statute of limitations would have long ago elapsed, shielding the defendants from the disruption and prejudice inherent in defending an aged claim. Nevertheless, the Second Circuit decision in *Oneida v. State of New York* makes it clear that this claim is not time-barred.

At the outset of its discussion, the Court rejected the view that a state statute of limitations could bar the action *ex propre vigore.* The Court's reasoning was that "the United States as a trustee on behalf of an Indian tribe would not be subject to state delay-based defenses," and therefore, "[i]t would be anomalous to allow the trustee to sue under more favorable conditions than those afforded the tribes themselves." 691 F.2d at 1083-84.

However, the defendants do not contend here that the state statute governs of its own force and effect. Instead, they—to be precise, the state defendants—argue that there is no federal statute of limitations which is applicable to plaintiff's claim, and that under such circumstances the most analogous state statute of limitations should be "borrowed" and applied as federal law. *See, Wilson v. Omaha Indian Tribe,* 442 U.S. 653, 99 S. Ct. 2529, 61 L. Ed. 2d 153 (1979); *Johnson v. Ry. Express Agency, Inc.,* 421 U.S. 454, 462, 95 S. Ct. 1716, 1721, 44 L. Ed. 2d 295 (1975). This Court is thus invited to reject the view taken in *Capitan Grande Bank of Mission Indians v. Helix Irrigation Dist.,* 514 F.2d 465, 471 (9th Cir.), *cert. denied,* 423 U.S. 874, 96 S. Ct. 143, 46 L. Ed. 2d 106 (1975), and by Judge Port in *Oneida v. County of Oneida, supra,* 434 F. Supp. at 542, that 28 U.S.C. § 2415 governs the timeliness of actions brought by tribes on their own behalf, as well as those brought by the United States as trustee.[8]

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[8] 28 U.S.C. § 2415. *Time for Commencing actions brought by the United States*

> (a) . . . an action for money damages brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the

The state defendants' argument for a restrictive reading of 28 U.S.C. § 2415 (and for a correspondingly restrictive reading of *Capitan Grande* and *County of Oneida*) is weighty, but now academic. The Second Circuit has answered "the question whether a delay based defense founded on federal law may be asserted," holding that "at the very least suits by tribes should be held timely if such suits would have been timely if brought by the United States." *Oneida v. New York*, 691 F.2d at 1084. That holding is dispositive as to the timeliness of this action. The Cayuga's cause of action accrued prior to 1966 and was filed prior to December 31, 1982. The United States could have brought this action on behalf of the tribe. 28 U.S.C. § 2415(a), (c), (g). It is at least as timely though brought by the Cayugas themselves.

VIII. EQUITABLE DEFENSES

The non-state defendants also advance a delay-based defense, invoking certain common law principles of equity. Relying upon *Felix v. Patrick*, 145 U.S. 317, 12 S. Ct. 862, 36 L. Ed. 719 (1892) and *Yankton Sioux*

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right of action accrued: *Provided further*, That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) . . . shall not be barred unless the complaint is filed after December 31, 1982. . . .

(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

. . .

(g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act.

Tribe of Indians v. United States, 272 U.S. 351, 47 S. Ct. 142, 71 L. Ed. 294 (1926), they contend that the equitable remedies of rescission and restitution are no longer available where the use and value of the land claimed has changed drastically, and where it is held by innocent purchasers.

In the Court's view, this argument may still be pertinent to the appropriateness of particular remedies, but can no longer refute the timeliness or maintainability of the action. As discussed in the preceding section, Congress has determined such claims to be timely when brought by the United States, 28 U.S.C. § 2415; and the Second Circuit has made it clear that tribal claims brought within that statutory period are also timely. *Oneida v. New York*, *supra*, 691 F.2d at 1084. An equitable argument that the action is untimely due to changed circumstances cannot override federal legislation. *See*, *Oneida v. New York*, *supra*; *Oneida v. County of Oneida*, *supra*, 434 F. Supp. at 542.

This is not to say that the equitable considerations noted in *Felix v. Patrick* and in *Yankton Sioux Tribe* will play no role in this lawsuit. Should plaintiffs ultimately prevail, equitable factors will be carefully weighed before any relief is granted. *See*, *Oneida v. New York*, *supra*, 520 F. Supp. at 1296. And, as stated previously in the discussion of justiciability, any such relief will be fashioned with the utmost restraint. However, those equitable factors do not render this action unmaintainable.

As a further equitable defense, the non-state defendants argue that a claim for recission cannot be asserted against parties not in privity with the plaintiff unless fraud is alleged. Their support for this proposition is *Gordon v. Burr*, 506 F.2d 1080 (2d Cir. 1974), in

which a purchaser of stock was allowed the remedy of rescission against a salesman where there was fraud, despite a lack of privity. Defendants' argument is faulty for several reasons. First, the Cayugas are not seeking rescission, or equitable cancellation of the conveying instruments—a remedy generally available only where the party lacks a plain, adequate, and complete remedy at law. 12A *C.J.S.* Cancellation of Instruments §§ 10, 11 (1980). Instead, they seek the appropriate legal remedy for one out of possession who claims a paramount right to possession: recovery of possession and damages through an action in ejectment. 28 *C.J.S.* Ejectment § 1-2, 25b (1941). Such an action may be maintained against a defendant in possession of the property, without regard for privity of estate or contract. 28 *C.J.S.* Ejectment §§ 25(2), 32.

Moreover, the holding in *Gordon v. Burr, supra,* is simply not instructive as to the availability of rescission with respect to the case at bar. In *Gordon,* the Court acknowledged that privity is ordinarily required "where an action for rescission is based on a contract theory—mistake or breach of contract . . . *see, generally* 3 Corbin Contracts § 613 (1960); 5 *id.* § 1104." 506 F.2d at 1083. It then declared the inapplicability of that privity requirement where "a suit is predicated on fraud." The Cayugas' claim, however, is not predicated on mistake, breach of contract, or fraud; it is predicated on the inalienability of tribal land under federal law. Nothing in *Gordon v. Burr* or any other case to the Court's knowledge limits the availability of rescission, in this type of claim, to plaintiffs in privity of contract with the defendant.[9]

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[9] In the course of arguing this point, the parties devoted considerable attention to issues which are more pertinent to a

Thus, neither of the equitable defenses asserted herein warrant either dismissal of the claim or the preclusion of any particular remedy against the non-state defendants.

IX. LEGAL SUFFICIENCY OF THE CLAIMS

In determining whether the plaintiffs have stated a claim upon which relief can be granted, we accept as true all material factual allegations in the complaint, and construe the complaint in favor of the complaining party. *Scheur v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 (1974); *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L. Ed. 2d 80 (1957); *Oneida v. New York*, 691 F.2d at 1074 (2d Cir. 1982). Dismissal under Rule 12(b)(6), Fed. R. Civ. P., is not

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conceptually similar defense: that the Cayugas may not recover against subsequent bona-fide purchasers of parcels in the claim area. Thus, the parties debated whether the conveyances should be deemed void *ab initio*, or merely voidable, and whether the statutory restraints against alienation are fully and equally enforceable against all current occupiers of the claimed land.

The defense of the bona-fide purchaser is a serious question which is not squarely before the Court on these motions, because it involves cognizance of matters outside the pleadings. The Court has not been briefed on the question, and it appears not to have been explicitly decided in prior decisions. *But see, Oneida v. County of Oneida*, 434 F. Supp. at 530 ("Although the present owners of the 100,000 acres may have acted in good faith when acquiring their property, such good faith will not render good a title otherwise not valid for failure to comply with the Nonintercourse Act.") *See also*, Comments, *supra*, 44 Albany L. Rev. 110, 131. The Court therefore declines to address issues of crucial importance to a defense not yet raised, where it is unnecessary for evaluating the defense that has been raised. It is sufficient, then, to hold that the absence of privity of contract does not bar plaintiffs from asserting their right of possession against current occupiers of the land.

warranted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, supra*, 355 U.S. at 45-46, 78 S. Ct. at 101-02; *Oneida v. New York*, 520 F. Supp. at 1308. It is with these principles in mind that the Court turns to the following challenges to the legal sufficiency of the Cayuga's claim: the inapplicability of the Nonintercourse Act to preemption States; the unavailability of a private right of action under the Nonintercourse Act, or of a federal common law remedy; the abatement of plaintiff's statutory claims.

X. APPLICABILITY OF THE NONINTERCOURSE ACT TO PREEMPTION STATES

It is the contention of the State defendants that the 1793 version of the Nonintercourse Act contained a change in language from its 1790 predecessor that reveals a Congressional intent to exclude New York State and other states with "preemptive rights" from its coverage.[10] The language of the 1790 Act, with the pertinent clause underscored, is as follows:

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[10] An explanation of what is meant by "pre-emptive rights" appears in *Mohegan Tribe v. State of Connecticut, supra*, 638 F.2d at 616-17:

> In accordance with the "right of discovery" of the European settlers, native Indians found in this country were granted the "right of occupancy" to their lands. That is, the natives were allowed to remain upon their lands, but their freedom to alienate those lands was restricted. The land could be sold only to the European settlers or the governmental authority representing those settlers . . . Thus, while the Indians retained the "right of occupancy," the settlers retained the "fee interest" in the land and retained a "pre-emptive right" to purchase the land from the Indians. After the Revolution, this "pre-emptive right" lay in the individual states—at least in the

> . . . no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

Act of July 22, 1790, ch. 33, 1 Stat. 137 § 4.

The 1793 version, which was operative at the time of the challenged 1795 conveyance, omits the underscored clause and reads as follows:

> . . . no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution. . . .

Act of March 1, 1793, ch. 19, 1 Stat. 329 § 8. The same language appears in the 1802 version, which was in effect at the time of the challenged 1807 conveyance.

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already settled part of the country. And when the states joined the Union, unless they ceded the lands, they retained their "pre-emptive rights." Nevertheless, the right to purchase Indian lands was not inconsistent with federal control over the extinguishment of Indian occupancy. Thus, the first Nonintercourse statute provided that even where the states retained "pre-emptive" rights to purchase the land, the federal government was responsible for overseeing any transfer of land from the Indians to the states.

See also, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 5 L. Ed. 681 (1823); *Oneida v. County of Oneida*, 414 U.S. 661, 666, 94 S. Ct. 772, 776, 39 L. Ed. 2d 73; *Oneida v. New York*, 520 F. Supp. at 1311.

Conceding that the 1790 statute applied uniformly throughout the United States, defendants argue that the deletion of the preemptive rights clause in the 1793 version was a deliberate measure to permit the original states to acquire Indian lands without federal supervision. Support for this proposition is derived from *Seneca Nation of Indians v. Christie*, 126 N.Y. 122, 145, 27 N.E. 275 (1891) in which the New York Court of Appeals concluded that the omission "place[d] purchases of Indian lands within the states upon a different footing than other purchases," and from *United States v. Franklin*, 50 F. Supp. 152 (N.D.N.Y. 1943) in which the district court found that "the omission is significant when viewed in the light of the practical construction given to the Act by both the State of New York and the United States." Defendants emphasize this last point, that contemporaneous and longterm construction confirms the non-applicability of the act to the original states, and they insist that it has not only been the state and federal governments, but the Cayugas themselves that have up to now proceeded on the assumption that the transactions were valid.

In determining the scope of a statute, the Court must first examine its language. *North Dakota v. United States*, 460 U.S. 300, 103 S. Ct. 1095, 1102-03, 75 L. Ed. 2d 77 (1983); *see, Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19, 100 S. Ct. 242, 246, 62 L. Ed. 2d 146 (1979). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 2056, 64 L. Ed. 2d 766 (1980). The language of the 1793 and 1802 Nonintercourse Acts reveals no ambiguity whatsoever as to their geographic scope. By

their express terms both are applicable to land transactions "within the bounds of the United States," and area that has always included the State of New York. It is difficult to conceive why Congress would have employed this unequivocally inclusive language if it sought to exclude from coverage most of the territory formerly within the scope of the statute. If such was its intent, one would expect Congress to have simply changed the previous clause, "any state, whether having the right of pre-emption or not," to some variant of "any state, except those having the right of pre-emption." Instead, Congress omitted all reference to preemption states, apparently deeming any reference superfluous, and made the statute applicable "within the bounds of the United States." In our view, that change of language evidences, if anything, a legislative intent to remove all doubt as to the uniformly-inclusive nature of the nonalienability clause.

In *Mohegan Tribe v. State of Connecticut*, *supra*, 638 F.2d 612, the Second Circuit closely examined the geographical scope of the Nonintercourse Act, and concluded that "the statute was meant to apply to Indian Land throughout the United States." *Id.* at 620. The defendants in that case had argued that the statute did not apply to eastern states because of the "surrounded by settlements" exception which appeared in each of the Trade and Intercourse Acts from 1793 to 1834. That provision stated that:

> nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the jurisdiction of the individual states.

In determining whether this provision limited the geographical scope of the Nonintercourse Act, the court first noted, as we have, that the plain language of the act admits of no intra-national geographical limitations, and that the presence of geographical limitations in other sections of the Act "suggest[s that Congress was careful to distinguish between regulations applicable only to Indian country and those applicable to all Indian tribes and their lands." *Id.* at 620.

Next, the Court examined the legislative and jurisdictional history of the Trade and Intercourse Acts, and found it consistent with "reading the Nonintercourse Statute, as its language suggests, to include encroachment upon Indian lands throughout the United States." *Id.* at 622. In reaching that conclusion the Court encountered the same argument advanced by the defendants here, that longstanding contemporaneous interpretation is indicative of the non-applicability of the statute to eastern states. It rejected that argument, stating:

> We believe that, although considerable evidence amassed by the State supports the proposition that the federal government did not avail itself of the provisions of the Nonintercourse statute and appeared to leave management of the affairs of the eastern tribes to the individual states, it does not follow that the federal government had no obligation to do so, or that the states had the authority—unimpeded by the Acts—to buy land from the eastern tribes without federal approval.

Id. at 623.

The Court then surveyed the case law with respect to the geographic scope of the Nonintercourse Act, and concluded:

> . . . the case law does not support the State's contention that we should ignore the plain language of the statute and limit the Nonintercourse statute's applicability. Moreover, while no case is controlling on the issue, *Oneida* [*v. County of Oneida*] does make clear that the extinguishment of all Indian title was meant to be a matter of federal concern. Since we have found no evidence that Congress intended to treat Indian lands in a different manner it would seem reasonable to believe that Congress intended a unified federal policy toward land acquisition from the Indians. In any event, we find nothing in the case law which dissuades us from our conclusion that Congress intended the Nonintercourse statute to apply throughout the United States.

Id., 626. In a final section of the *Mohegan* decision, the "surrounded by settlements" exception was construed to apply only to those provisions of the Trade and Intercourse Act which regulated trade and intercourse, and not to the Nonintercourse Act, which governs conveyances of land.

The State defendants contend that *Mohegan* may be read only for its ultimate holding—that the "surrounded by settlements" exception does not limit the Nonintercourse Act—and thus does not preclude them from asserting other theories for excluding eastern states from coverage of the Act. In our view, however, it is improper to fixate on the ultimate holding in *Mohegan* and ignore almost the entire basis for that

holding: the Court's finding that the statutory language, the legislative and jurisdictional history, and the case law all indicate that the Nonintercourse Act was meant to apply to land transactions throughout the United States.

Even if *Mohegan* were deemed distinguishable for not having addressed the specific geographic limitation asserted here, it may be noted that the district court which entertained the case upon remand did reach this precise question, and found no implied exclusion for preemption states. *Mohegan v. State of Connecticut*, 528 F. Supp. 1359, 1364 (D. Conn. 1982). In so doing, Judge Blumenfeld observed that the 1793 revisers also deleted those words in the 1790 Act which had made it applicable "to any person or persons"; he noted that, under defendant's logic, the omission would be indicative of a Congressional intent to exclude "any person or persons" from the Act's restrictions—a patent absurdity. Instead, the Judge viewed the change of language as creating "a stronger prohibition, not a weaker one, because Congress omitted the earlier limitation on the class of prohibited grantees." *Id.* at 1364.

The cases relied upon by the state do not warrant a pronouncement that the Nonintercourse Act is inapplicable to preemption states. In *Seneca v. Christie*, *supra*, 126 N.Y. 122, 27 N.E. 275, (1891), the Court of Appeals did not hold the Nonintercourse Act inapplicable to New York State. It cited the change in language in support for its holding that a lesser degree of formalities would constitute federal approval of purchases in preemption states than elsewhere. After finding indicia of federal approval of the challenged treaty, including the presence of a United States Commissioner at its conclusion, the Court affirmed a directed

verdict which had been issued below. Thus, even were this Court to adopt the construction employed in *Seneca* (which has arguably been undermined by the holding in *Mohegan*), it would not warrant dismissal of the complaint: plaintiffs have specifically alleged an absence of federal approval of the transactions now under scrutiny.

United States v. Franklin County, 50 F. Supp. 152 (N.D.N.Y. 1943), however, is not distinguishable. The district court therein expressly concluded that the change of language "is indicative of an intent to exempt a state 'having the right of pre-emption' from the provisions thereof." *Id.* at 155. One basis for its conclusion was the longstanding contemporaneous construction argument: that the sheer number of treaties concluded by the State without federal interference proves that the statute did not apply to New York State. But, as stated previously, the Second Circuit has not been impressed with that argument, *Mohegan*, 638 F.2d at 638, and neither is this Court. This is not a situation in which a statute has been consistently applied in a particular manner so as to suggest that the statute is properly construed in harmony with that application. Rather, the statute in question has evidently been largely disregarded by state and federal authorities for indeterminate reasons. As the district court in *Mohegan* aptly notes, the disregard of federal restraints on alienation "can[not] be said to have established the meaning of 25 U.S.C. § 177 and its predecessors." *Mohegan, supra*, 483 F. Supp. at 604.

The *Franklin* Court also based its decision on an overly broad reading of *Seneca v. Christie*, which, as discussed above, treated the Nonintercourse Act as applicable to pre-emption states. Finally, there is an

incorrect intimation in *Franklin* that the federal government lacks authority to regulate the extinguishment of Indian title within the states; that in such matters, "the State has an exclusive right to deal." *Id.* at 156. That view is contrary to now clear principles of federal sovereignty over and responsibility for tribal lands, which were expressed by Justice White in *Oneida v. County of Oneida, supra:*

> The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13. It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the pre-emptive right to purchase from the Indians, was in the State, *Fletcher v. Peck*, [(10 U.S.)] 6 Cranch 87, 3 L. Ed. 162 (1810). But this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law.

414 U.S. at 670, 94 S. Ct. at 778.

Thus the decision in *United States v. Franklin County*, though in point, does not adequately substantiate its restrictive view of the geographic scope of the Nonintercourse act to commend its adoption here. In this regard, the Court joins company with *Mohegan, supra*, and with *Oneida v. County of Oneida*, 434 F. Supp. at 540, both of which rejected the holding of *Franklin* for substantially similar reasons.

Defendants have thus failed to convince the Court that the language in the Nonintercourse act making it

applicable "within the bounds of the United States" was employed with intent to exclude the State of New York from its geographic scope.

XI. PLAINTIFFS' RIGHT OF ACTION

In support of their motion to dismiss, the non-state defendants advance the novel argument that the Nonintercourse Act does not afford a private right of action. The argument begins with the proposition that none of the versions of the Nonintercourse Act have expressly provided that an Indian tribe or any other private party could sue to enforce its provisions or recover for statutory violations. It is therefore contended that, in order for the Cayugas to establish a right to sue to recover for injuries sustained as a result of an alleged violation of the Act, they must first show that the action meets the criteria set forth in *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975) for determining whether a private remedy is implicit in a statute not expressly providing one. The criteria are as follows:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," . . . Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78, 95 S. Ct. at 2088 (emphasis in original).

Defendants correctly consider the intent of the enacting Congress to be the key inquiry in such analysis,

Transamerica Mortgage Advisors Inc. v. Lewis, 444 U.S. 11, 15-16, 100 S. Ct. 242, 245, 62 L. Ed. 2d 146 (1979). They contend that there is no indication in the language of the successive acts, or in the legislative history of those acts, of a legislative intent to create a private right of action. They find evidence of a contrary intent in the fact that Congress provided various enforcement provisions and penalties in the 1793 Act and subsequent Acts, other than a private right of action for possession or damages; it thereby revealed that, "when Congress wished to provide a . . . remedy, it knew how to do so and did so expressly." *Touche Rose & Co. v. Redington*, 442 U.S. 560, 572, 99 S. Ct. 2479, 2487, 61 L. Ed. 2d 82.

Particular significance is attached to provisions in the 1793 Act which empowered the President to remove persons settling on Indian lands, and which made the purchase of Indian lands in violation of the non-alienability provisions a misdemeanor punishable by a fine not exceeding $1,000 and up to twelve month's imprisonment. This, in defendant's view, evidences a legislative intent not to create other remedies, such as a private right of action.

Defendants add that it is particularly unlikely for the enactors to have intended that a right of action be available to an Indian tribe, since until the late eighteenth century it was doubtful that Indian tribes could sue in federal court, absent special legislation.

Finally, a variety of excerpts from historical and legal sources are produced by the defendants in an effort to establish that the Nonintercourse Act was not enacted for the purpose of protecting Indians, but rather to maintain peace and order on the frontier. In this view, Congress was concerned with the alienation of Indian

land only insofar as it engendered a risk of Indian wars or other retaliatory acts against non-Indians. Since the act was meant to benefit the public at large, and since the enforcement provisions and penalties set forth in the Act were ample to effectuate such purpose, defendants conclude that the implication of a private remedy would be inappropriate.

The defendants' argument is elaborate and well-researched, but unpersuasive for a number of reasons.

A. *The Complaint Asserts a Current Right to Possession Conferred by Federal Law Without Reliance on an Implied Right of Action Under the Nonintercourse Act*

1. *The Characterization of the Claim in Oneida v. County of Oneida.*

The Supreme Court decision in *Oneida v. County of Oneida*, 414 U.S. 661, 94 S. Ct. 772, 39 L. Ed. 2d 73 (1974) did not address the implied right of action question now before this Court, but its analysis of the jurisdictional basis of a similar claim establishes that such claims are not strictly "based on," "arising under," or "implied from" the Nonintercourse Act. As noted in the previous discussion on jurisdiction, the claim in *Oneida* was virtually identical to the claim at bar, save the size and location of the disputed tract. Like the Cayugas, the Oneida tribe alleged that their right of possession had been confirmed by federal treaty, and was subject to the restraint against alienation in the Nonintercourse Act. They also alleged dispossession through conveyances to the State of New York.

The district court and the Court of Appeals read the complaint in *Oneida* as stating a claim, under state law, to establish a right to the possession of real property,

Oneida v. County of Oneida, (N.D.N.Y. Nov. 9, 1971), *aff'd*, 464 F.2d 916 (2d Cir. 1972) (Friendly, C.J.); the higher court specifying that the suit constituted an action in ejectment. 464 F.2d at 920. Both courts reached the conclusion that there was no federal question jurisdiction under 28 U.S.C. § 1331 or § 1362 since (1) the mere allegation of a federal source of title does not convert an ordinary action for possession into a federal case; and (2) the allegation that the conveyance to the state violated the Nonintercourse Act is not a necessary element of a well-pleaded complaint in a possessory action, because it is alleged in anticipation of and to avoid a defense of a valid conveyance.

The Supreme Court accepted the premise shared below that "the case was essentially a possessory action," *id.* at 666, but rejected the conclusion that the action presented no federal question. Federal jurisdiction was implicated in that "the right to possession itself is claimed to arise under federal law in the first instance." *Id.* at 676. The Court distinguished other suits for possession claiming title under a federal statute, patent, or treaty which were found devoid of the requisite federal question, *e.g.*, *Taylor v. Anderson*, 234 U.S. 74, 34 S. Ct. 724, 58 L. Ed. 1218 (1914), on the grounds that such suits were by individuals; tribal suits were deemed on a different footing. But the crucial point here is that the Court considered the Indian's claim as a traditional possessory claim which could be maintained in federal court because of the "nature and source" of tribal rights in land:

> Given the nature and source of the possessory rights of Indian tribes to their aboriginal lands, particularly when confirmed by treaty, it is plain that the complaint asserted a controversy arising under the

> Constitution, laws, or treaties within the meaning of both § 1331 and § 1362.

Id. at 667.

This is not to say that the allegation that plaintiff's title had been extinguished in violation of the Nonintercourse Act was irrelevant for the purpose of determining jurisdiction. Indeed, the Court emphasized that:

> the assertion of a federal controversy does not rest *solely* on the claim of a right to possession derived from a federal grant of title . . . Rather, it rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory rights to tribal lands . . . .

Id. at 782 (emphasis added).

At one point, the Court even acknowledged that the Oneida's complaint, in part, "asserts a claim under the Non-Intercourse Acts." *Id.* at 678. But the thrust of that same paragraph, as well as of the opinion as a whole, is that the Oneidas were asserting a possessory right based primarily on the unique source and nature of their tribal property interest. The alleged violation of the Nonintercourse Act, though an inevitable and key issue in *Oneida*, and here as well, is not necessarily regarded as the source or basis of the claim.

The concurring opinion of Justice Rehnquist, joined by Justice Powell, confirms this reading of the *Oneida* decision. Near the outset of his opinion, Justice Rehnquist acknowledges and approves the majority's characterization of the action:

> As the majority seems willing to accept, the complaint in this action is basically one in ejectment. Plaintiffs are out of possession; the defendants are in possession, allegedly wrongfully; and the plaintiffs claim damages because of the allegedly wrongful possession. These allegations appear to meet the pleading requirements for an ejectment action as stated in *Taylor v. Anderson*, 234 U.S. 74, 34 S. Ct. 724, 58 L. Ed. 1218 (1914). Thus the complaint must be judged according to the rules applicable to such cases.

Id. at 683.

Justice Rehnquist then reasoned, much as the majority did, that the peculiar source of the Indians' interest, coupled with the federal government's "continuing solicitude for the rights of Indians in their land," *id.* at 683, created federal court jurisdiction over what might otherwise be a state law suit in ejectment.

The *Oneida* decision and its concurrence make it clear that the complaint before this Court presents a possessory claim, "basically in ejectment," with federal jurisdiction based on the source, nature, and continuing federal interest in the contested possessory right. *See also, Mohegan Tribe v. State of Connecticut*, 638 F.2d at 625. Viewed as such, there is simply no need to determine whether a parallel claim for the same relief might be asserted on the theory that a private right of action is implicitly afforded by the Nonintercourse Act.[11]

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[11] Plaintiffs inform the Court that during the district court proceedings in *Oneida v. County of Oneida* upon remand, Judge Port offered the following comment from the bench:

> The principle thrust of the [defendants'] argument is a reassertion of the non-justiciability and the lack of an implied cause-

2. *Availability of a Common Law Cause of Action*

Defendants dispute the Cayuga's right to assert a possessory claim without statutory authorization for the cause of action. They rely largely upon *Milwaukee v. Illinois*, 451 U.S. 304, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981) for the general proposition that federal common law remedies are disfavored, and for the view that any such remedies previously available have been preempted by the Trade and Intercourse Acts.

Turning first to the more general limitations on federal common law remedies, defendants cite the following familiar principle:

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of-action arguments. These were made earlier. I have ruled adversely to the defendants. Those arguments did not, in my opinion, support a dismissal for failure to state a claim after a trial. They do not support a denial of damages. I think what's been missed here, when you talk about implied causes of action under the Non-Intercourse Act, is that it is not necessary to seek out an implied cause of action. The old common law action of trespass will do very well. Why be inventive? You're going to invent the wheel all over again.

Transcript at 19 (October 5, 1981).

Defendants vigorously argue that the above-quoted comments were unsolicited and unwarranted; that the implied right-of- action argument had been tangentially raised by the *Oneida* defendants in a memo prior to trial on the liability issue, but had then been dismissed by the Court as outside the scope of its pre-trial order. Consequently, when the remarks were made after trial, the issue was no longer present in the case.

Accepting defendants' account of the *Oneida* proceeding, it would indeed be improper to accord *stare decisis* status to Judge Port's conclusion. However, this Court has reached a similar conclusion after independently considering the question. The quote is reproduced here merely as a concise and intuitive statement close to our own view of the issue.

> Federal courts, unlike state courts, are not general common law courts and do not possess a general power to develop and apply their own rules of decision . . . The enactment of a federal rule in an area of national concern . . . is generally made not by the federal judiciary, purposely insulated from democratic pressures, but by the people through their elected representatives in Congress.

Id. at 312-13, 101 S. Ct. at 1790 (citations omitted).

The question presented in *Milwaukee* was whether the respondent states of Illinois and Michigan could invoke federal common law principles of nuisance to require stricter effluent limitations than those imposed by the Water Pollution Control Act Amendments of 1972. Starting from the assumption that "it is for Congress, not the federal courts to articulate the appropriate standards to be applied as a matter of federal law," *id.* at 317, 101 S. Ct. at 1792, the Court held that the federal judiciary lacked authority to enforce more stringent limitations than those provided by Congress.

Nothing in *Milwaukee* inhibits this Court from permitting the Cayugas to sue to establish a right to possess property. The plaintiffs are not asking the Court to create substantive law of the type which concerned the Court in *Milwaukee*. Instead, plaintiffs point to specific treaties which define the scope of their substantive right to possession, and the construction of those sources—not federal common law—will determine the validity of their claim. Federal common law is invoked at this point only as a source for the right of action, only for the proposition that an Indian possessory action may be asserted in a court of proper juris-

diction without express statutory authorization. That principle is well-established.

"Indian lands claims have traditionally been asserted in the courts of this country for resolution." *Oneida v. New York*, 691 F.2d at 1081. In *Oneida v. Oneida County*, the Supreme Court remarked upon the "almost countless cases" in which the possessory rights of Indian tribes have been adjudicated, and listed many of them. 414 U.S. at 669 n.5, 94 S. Ct. at 778 n.5. During the long history of adjudications involving the conveyability of Indian land, rarely have courts noted their reliance upon any statutory basis for the cause of action. *See, e.g., Meigs v. McClung's Lessee*, 13 U.S. (9 Cranch) 11, 3 L. Ed. 639 (1815); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 542, 5 L. Ed. 681 (1823); *Patterson v. Jenks*, 27 U.S. (2 Pet.) 216, 7 L. Ed. 402 (1829). It appears to have been simply assumed that title to land necessarily included the ability to assert ownership rights in a court of proper jurisdiction, for "[h]ow can it be said to be any title at all which cannot be asserted in a court of justice by the owner to defend or obtain possession?" *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 11, 5 L. Ed. 547 (1823) (Story, J.). *See also, id.* at 32 (Washington, J.) (at common law, "right to land . . . includes the right . . . to recover the possession by suit"). Accordingly, the Supreme Court could confidently state in *Marsh v. Brooks*, 49 U.S. (8 How.) 223, 232, 12 L. Ed. 1056 (1850), "[t]hat an action of ejectment could be maintained on an Indian right of occupancy and use, is not open to question." *See also*, F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) 523 ("The right to protection of tribal possession through actions of ejectment, trespass, or other similar possessory suits was affirmed early in the nation's history").

To be sure, there is an unfortunate lack of specificity in early federal court cases involving Indian possessory rights as to the governing sphere—state or federal—which provided the right of action. *See generally*, A. Hill, The Law Making Power of the Federal Courts: Constitutional Preemption, 67 *Colum.L.Rev.* 1024, 1028, 1069 (noting that such lack of specificity was endemic in the pre-Erie era). Nevertheless, it has long been clear that "Indian title is a matter of federal law," *Oneida v. Oneida County*, 414 U.S. at 670, 94 S. Ct. at 778; *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 345, 62 S. Ct. 248, 251, 86 L. Ed. 260 (1941), and, properly viewed, it is federal common law that has implicitly supplied the right of action in federal possessory actions. *C.f., Oneida v. Oneida County*, 414 U.S. at 674, 94 S. Ct. at 780 ("absent federal statutory guidance, the governing rule of decision [for a tribal ejectment action] would be fashioned by the federal court in the mode of the common law."). *See also, United States v. Forness*, 125 F.2d 928 (2d Cir.), *cert. denied, sub. nom. City of Salamanca v. United States*, 316 U.S. 694, 62 S. Ct. 1293, 86 L. Ed. 1764 (1942).

The Supreme Court decision in *Milwaukee v. Illinois*, *supra*, does not purport to disable federal courts from continuing their traditional reliance upon federal common law for such interstitial purposes, 451 U.S. at 324-25 n.18, 101 S. Ct. at 1796 n.18, and it certainly does not address itself to the unique exigencies of tribal land claims. The Court, therefore, declines defendants' invitation to place a new impediment in the way of such claims, by requiring a statutory basis for a cause of action heretofore freely available.

3. *Preemption of the Common Law Right of Action*

Nor does the Court accept defendants' contention that Congress preempted any common law right of action to enforce tribal possessory rights by enacting the Trade and Intercourse Acts. The question of whether a federal statute preempts an existing federal common law remedy is distinct from the question of whether a statute implies a private right of action, but Congressional intent and the comprehensiveness of the statute are key elements in either determination. *See, Middlesex County Sewage Authority v. National Sea Clammers Assn.*, 453 U.S. 1, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981) (Federal Water Pollution Control Act and Marine Protection & Sanctuaries Act do not provide an implied right of action, and preempt the federal common law of nuisance). The case primarily relied upon the defendants, *Milwaukee, supra*, established that the enactment of a comprehensive statute which has "addressed the problem" or "occupies the field" indicates a congressional intent to supplant parallel common law remedies. As mentioned previously, *Milwaukee* involved construction of the Federal Water Pollution Control Act, "a comprehensive regulatory program supervised by an expert administrative agency." *Id.* 451 U.S. at 317, 101 S. Ct. at 1792. The Court discerned from that statute a Congressional intent to preclude the judicial imposition of more stringent effluent limitations through the application of federal common-law principles.

The Trade and Intercourse Act neither created a "comprehensive regulatory program" with respect to tribal possessory rights, nor "addressed the problem" in the sense that the FWPCA did in the water pollution

field. As described in *Mohegan Tribe v. State of Connecticut*, 638 F.2d 612, 616 (2d Cir. 1980), "the majority of sections of the original Act established a system of licensing fur trade with the Indians and imposed federal authority over crimes committed on Indian property." Though the Act became more elaborate in subsequent re-enactments, the pattern remained the same: trade and intercourse were the focus of most sections; possessory rights were substantially confined to the single Nonintercourse Act section. That section, too, became more elaborate, setting forth penalties and punishments for violators. The 1793 version, for example, made violation a misdemeanor punishable by up to $1,000 fine and twelve month's imprisonment. The addition of this penal clause, however, does not transform the Trade and Intercourse Acts into the type of comprehensive legislation which has been found to displace pre-existing common law remedies. *See, e.g., National Sea Clammers, supra* (FWPCA and Marine Protection and Sanctuaries Act preempt common law nuisance remedies); *Amoco Oil Co. v. Local 99, Int'l Bro. of Elec. Wkrs.*, 536 F. Supp. 1203 (D.R.I. 1982) (NLRA preempts common law remedies for tortious interference with a labor contract); *United States v. Kin-Buc, Inc.*, 532 F. Supp. 699 (D.N.J. 1982) (Clean Air Act preempts common law nuisance remedies); *United States v. Price*, 523 F. Supp. 1055 (D.R.I. 1981) (Resource Conservation and Recovery Act and Comprehensive Environmental Response, Compensation, and Liability Act preempt federal common law nuisance remedies).

The more crucial question, however, is whether Congress has "addressed the problem" for which the plaintiffs are invoking a common law remedy. In this

instance it has not. Nothing in the Trade and Intercourse Acts touches upon the traditional mechanisms for the enforcement of possessory rights. While it is true that matters beyond those specifically addressed by a comprehensive statute may be displaced by implication, *Illinois v. Outboard Motor Corp.*, 680 F.2d 473 (7th Cir. 1982) there must be an ample basis for discerning such an expansive preemptive effect. In this instance, the Court finds no basis for the notion that a statute which explicitly invalidates title held by some, implicitly preempts the right of others to assert their own possessory rights. The Nonintercourse Act has never been deemed to emit such preemptive emanations; we decline to announce their discovery here.[12]

B. The Right of Action of the United States may be invoked by a Tribal Trust-Beneficiary

As discussed above, the Court has concluded that the Cayugas may, as a matter of federal common law, assert a claim to recover possession of tribal lands. In this section, the Court notes an alternative basis for the tribal right of action, which still does not necessitate the inference of a private right of action under the Nonintercourse Act.

It is well established that the United States may, as trustee on behalf of an Indian tribe, bring suit to enforce tribal possessory rights protected by the

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[12] Although the question of whether a federal statute preempts a state statute involves somewhat different considerations than those raised by a question of preemption of federal common law, *Milwaukee, supra*, 451 U.S. at 316, 101 S. Ct. at 1792, it is instructive to note that the Nonintercourse Act was found not to have preempted additional remedies provided in a parallel state restraint against alienation of Indian lands. *New York ex rel. Cutler v. Dibble*, 62 U.S. (21 How.) 366, 16 L. Ed. 149 (1859).

Nonintercourse Act and other federal laws. *See, e.g., United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 62 S. Ct. 248, 86 L. Ed. 260 (1941); *United States v. Candelaria*, 271 U.S. 432, 46 S. Ct. 561, 70 L. Ed. 1023 (1926); *Cramer v. United States*, 261 U.S. 219, 43 S. Ct. 342, 67 L. Ed. 622 (1923); *Heckman v. United States*, 224 U.S. 413, 32 S. Ct. 424, 56 L. Ed. 820 (1911); *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956); *United States v. Forness*, 125 F.2d 928 (2d Cir. 1942); *United States v. 7,405.3 Acres of Land*, 97 F.2d 417 (4th Cir. 1938); *United States v. Boylan*, 256 F. 165 (2d Cir.1920); *United States v. Franklin County*, 50 F. Supp. 152 (N.D.N.Y. 1943).[13] And, as noted previously, it is also established that the purpose and effect of 28 U.S.C. § 1362 was "to open the federal courts to the kinds of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought." *Moe v. Consolidated Salish & Kootemai Tribes*, 425 U.S. 463, 472, 96 S.Ct 1634, 1641, 48 L. Ed. 2d 96 (1976). *See, Oneida v. New York, supra*, 691 F.2d at 1080, 1084. The measure was meant to assure the tribes "of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys." H.R. Rep. No. 2040, 89th Cong., 2d Sess., 2-3, *reprinted in* 1966 U.S.Code Cong. & Ad. News 3145, 3147. *See, Oneida v. New York, supra*, 691 F.2d at 1080; *Narrangansett Tribe of Indians v. So. R.I. Land Devel. Corp., supra*, 418 F. Supp. 798, 806 (D.R.I. 1976).

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[13] Indeed, the failure of the United States to bring such action may, in certain circumstances, constitute an actionable breach of fiduciary duty. *United States v. Oneida Nation of New York*, 201 Ct. Cl. 546, 477 F.2d 939 (1973).

The United States could have brought this suit, but has, according to the parties, declined to do so. The Cayugas are therefore to be afforded an opportunity to do so on their own behalf. In short, the right of action owned by the United States to enforce the Nonintercourse Act may, due to 28 U.S.C. § 1362, be invoked by the affected Indian tribe. The Cayugas are exercising that derivative right of action in bringing this lawsuit.

C. *A Private Right of Action is Implicit in the Nonintercourse Act*

Assuming plaintiffs could not raise their claims except by a private right of action implicit in the Nonintercourse Act, there is sufficient basis for finding that such implied right of action exists.

In *Merrill Lynch Pierce Fenner & Smith v. Curran*, 456 U.S. 353, 102 S. Ct. 1825, 72 L. Ed. 2d 182 (1982), the most recent Supreme Court decision on the implication of private remedies, the Court offered an historical overview of the changing judicial approaches to that recurrent problem. Speaking through Justice Stevens, the Court explained:

> Our approach to the task of determining whether Congress intended to authorize a private cause of action has changed significantly, much as the quality and quantity of federal legislation has changed. When federal statutes were less comprehensive the Court applied a relatively simple test to determine the availability of a private remedy. If the statute was enacted for the benefit of a special class, the judiciary normally recognized a remedy for members of that class. *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 36 S. Ct. 482, 60 L. Ed. 874 (1916).

Id., 456 U.S. at 374, 102 S. Ct. at 1837.

The principle of *Rigsby*, that a statutory violation gives rise to a cause of action for damages "to one of the class for whose especial benefit the statute was enacted," 241 U.S. at 39, was the prevailing approach throughout most of our history. *Merrill Lynch, supra* at 374, 102 S. Ct. at 1837. The approach was considered to be "but an application of the maxim, *Ubi jus ibi remedium* ", where there is a right, there is a remedy. *Rigsby, supra*, 241 U.S. at 39, 36 S. Ct. at 484. *See also, Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 ("'[I]t is a general and indisputable rule, that where there is a legal right, there is also a remedy by suit, or action at law, whenever that right is invaded.'", *quoting*, 3 W. Blackstone, *Commentaries* 23); *Merrill Lynch, supra* at 375 n.54, 102 S. Ct. at 1837 n.54. The Court in *Merrill Lynch* further noted that, "while the Rigsby approach prevailed . . . congressional silence or ambiguity was an insufficient reason for the denial of a remedy", *id.* at 377, 102 S. Ct. at 1838, and that federal courts traditionally "regarded the denial of a remedy as the exception rather than the rule." *Id.* at 375, 102 S. Ct. at 1838.

In the 1975 decision, *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26, the Court announced a more exacting set of criteria for determining whether a private right of action is implicit in a statute not expressly providing one. Although *Cort v. Ash* lists four factors to consider in making the determination, reproduced *infra*, it has become clear that the central inquiry under the new approach is "whether Congress intended to create the private remedy asserted." *Transamerica Mortgage Advisors Inc. v. Lewis*, 444 U.S. 11, 15-16, 100 S. Ct. 242, 245, 62 L. Ed. 2d 146 (1979); *Middlesex Cty. Sewage Auth. v. Nat. Sea Clammers Ass'n.*, 453 U.S. 1,

13, 101 S. Ct. 2615, 2622, 69 L. Ed. 2d 435 (1981). In *Merrill Lynch, supra*, 456 U.S. at 377, 102 S. Ct. at 1839, the Court attributed its new restrictive attitude to "the increased complexity of federal legislation and the increased volume of federal litigation. . . ."

Despite the fact that the new restrictive approach to inferring private rights of action was devised in response to problems inherent in modern legislation, defendants assume that such approach must be employed in the analysis of a statute which has remained substantially the same since 1793. In light of *Merrill Lynch*, however, that assumption must be discarded. As the Court stated:

> In determining whether a private cause of action is implicit in a federal statutory scheme when the statute by its own terms is silent on the issue, the initial focus must be on the state of the law at the time the legislation was enacted.

456 U.S. at 378, 102 S. Ct. at 1838. *See also, Cannon v. University of Chicago*, 441 U.S. 677, 698-99, 99 S. Ct. 1946, 1958, 60 L. Ed. 2d 560; *Mohegan v. State of Connecticut, supra*, 638 F.2d 612, 621 (Indian legislation "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them," *quoting, Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206, 98 S. Ct. 1011, 1019, 55 L. Ed. 2d 209 (1978)).

As noted above, the Nonintercourse Act was enacted during a period in which federal courts, "following the common law tradition," regularly inferred private rights of action from statutes not expressly providing them. *Merrill Lynch, supra* 456 U.S. at 375, 102 S. Ct. at 1838. *See also*, T. Frankel, Implied Rights of Action,

67 *Va. L. Rev.* 553, 555. It must be presumed that Congress was aware of this judicial proclivity when it acted. *Cf., Merrill Lynch, supra* at 382 n.66, 102 S. Ct. at 1841 n.66 ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute. . . ."). Accordingly, it is anachronistic to regard the absence of an express right of action in this 18th Century legislation as indicative of a lack of legislative intent to allow such an action. Indeed, to require the Court to locate an affirmative expression of congressional intent before permitting a private action under a statute of this era would be more likely to defeat actual Congressional intent than to effectuate it.

This is, of course, not to say that *Merrill Lynch* requires federal courts to infer private rights of action freely from statutes enacted before *Cort v. Ash* and sparingly from those enacted thereafter. *Cort v. Ash* itself involved the construction of a measure which had been enacted in 1907: 18 U.S.C. § 610, which prohibited campaign contributions or expenditures by national banks, corporations, and labor organizations. But that measure was nevertheless part of a modern and comprehensive statutory scheme, for which the criteria employed by the Court in its decision were well-suited. In subsequent cases in which the implied right of action issue was considered, the legislation was of a similar nature. *See, e.g., Merrill Lynch, supra* (Commodity Exchange Act amendments of 1973); *Middlesex Cty. Sewage Auth. v. Nat. Sea Clammers Ass'n., supra* (Federal Water Pollution Control Act of 1972); *Touche Ross & Co. v. Reddington, supra* (Securities Exchange Act of 1934); *Cannon v. University of Chicago, supra* (Title IX of Education Amendments of 1972). The problem with applying the *Cort v. Ash* criteria to the

Nonintercourse Act is not, therefore, that the statute predates the decision. It is, rather, that the criteria were devised as a means to ascertain congressional intent with respect to complex legislation enacted in a modern jurisprudential context. If those criteria are formalistically applied to the antique measure now under scrutiny, it is most doubtful that an accurate portrayal of congressional intent will emerge.

Accordingly, the determination of whether a private right of action exists under the Nonintercourse Act will be made by applying the implication principles accepted by Congress and the Courts of the enactment era: the *Rigsby* approach. The Cayugas, then, may infer a private right of action under the Act provided their tribe is "one of the class for whose especial benefit the statute was enacted. . . ." *Rigsby, supra* at 39, 36 S. Ct. at 484.

There can no longer be any doubt but that Indian tribes are especial beneficiaries of the Nonintercourse Act. In *Joint Tribal Council of the Passamaquoddy Tribe v. Morton, supra*, 388 F. Supp. 649 (D. Me. 1975), Judge Gignoux thoroughly examined the extensive case law on the purpose of the Act, and was able to conclude that:

> [e]very court . . . which has considered the purpose of the [Nonintercourse] Act has agreed that the intent of Congress was to protect the lands of the Indian tribes in order to prevent fraud and unfairness.

Id. at 656. Most notable among the many cases cited therein is *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 80 S. Ct. 543, 4 L. Ed. 2d 584 (1960), in which the Supreme Court declared:

> The obvious purpose of that [Nonintercourse Act] is to prevent the unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties . . . .

Id. at 119, 80 S. Ct. at 555. Judge Gignoux' further research on the subject is worth reproducing, as it indicates the extent of the judicial consensus on the statutory purpose:

> The decided cases are replete with similar statements of the Act's purpose. *E.g., United States v. Candelaria*, 271 U.S. 432, 441-42 [46 S. Ct. 561, 562-63, 70 L. Ed. 1023] . . . (1926) (the intent of Congress was "to prevent the Government's Indian wards from improvidently disposing of their lands and becoming homeless public charges," . . .; *Tuscarora Nation of Indians v. Power Authority*, 257 F.2d 885, 888 (2d Cir. 1958) . . . (the statute was enacted "to prevent Indians from being victimized by artful scoundrels inclined to make a sharp bargain"); *Alonzo v. United States*, 249 F.2d 189, 196 (10th Cir. 1957) . . . (the purpose of such legislation is to protect the Indians "against the loss of their lands by improvident disposition or through overreaching by members of other races"); *Seneca Nation of Indians v. United States*, 173 Ct. Cl. 917, 923 (1965) ("From the beginning, this legislation has been interpreted as giving the Federal Government a supervisory role over conveyances by Indians to others, in order to forestall fraud and unfairness.")

Id., 388 F. Supp. at 656-57.

Cases since the district court decision in *Passamaquoddy* have adhered to the rather self-evident proposition that the Nonintercourse Act was intended

to protect Indians. *E.g., Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 377 (1st Cir. 1975) ("to prevent to unfair, improvident, or improper disposition of Indian lands"); *Oneida v. County of Oneida*, 434 F. Supp. 527, 538 ("to protect the Oneida nation"); *Schaghticoke Tribe of Indians v. Kent School Corp., Inc.*, 423 F. Supp. 780, 784 (D. Conn. 1976) ("to protect the Indians from their own improvidence and to prevent the unfair or improper disposition of Indian lands"); *Narragansett Tribe v. So. R.I. Land Devel. Corp.*, 418 F. Supp. 798, 803 (D.R.I. 1976) ("'to prevent the government's Indian wards from improvidently disposing of their lands and becoming homeless public charges'").[14]

Notwithstanding this judicial consensus, defendants urge this Court to re-examine the historical background of the Nonintercourse Act and declare that its purpose was to promote peace on the frontier for the benefit of the public at large, and that it was not meant to benefit any special class in particular. A major source of support for their thesis is an address made in 1791 by President George Washington, in which he discussed the objectives of the statute:

> Among the most important of these [objectives] is the defense and security of the western frontiers. To accomplish it on the most humane principles was a primary wish.

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[14] To be sure, the purpose of the Nonintercourse Act as stated in the cited cases may today be criticized for its paternalistic assumptions. *See*, F. Cohen, *supra* at 509 (noting this, but describing less paternalistic functions the Act continues to serve). However, the Court's duty here is to identify the Act's purpose, not to critique it.

> Accordingly . . . effectual measures have been adopted to make those of a hostile description sensible . . .
>
> It is sincerely to be desired that all need of coercion in the future may cease; and that an intimate intercourse may succeed . . .
>
> In order to do this, it seems necessary . . . [t]hat the mode of alienating their lands, the main source of discontent and war, should be defined and regulated as to obviate imposition.

American State Papers: *Foreign Relations* 16.

The thesis advanced by the defendants does, at least in part, explain the purpose for granting protection to the Indians. Indeed, the Second Circuit has recognized as much in *Mohegan Tribe v. State of Connecticut*, 638 F.2d 612 (1981). The defendants in that case had argued that, since the purpose of the Nonintercourse Act was to promote peace on the frontier and not to protect Indian tribes, the Act should be construed to cover only land in "Indian Country", and not the Connecticut lands in issue. After considering many of the same primary and secondary sources that have been cited by the defendants here, the Court acknowledged,

> Of course, Washington and Knox and their countrymen were concerned not only with protecting the Indians, but with preventing the onset of overt hostilities. Moreover, it is true that peace along the frontier, and in particular the prevention of encroachment by non-Indian settlers on Indian lands along the frontiers, were primary objects of the Act's land provisions.

Id. at 622. However, the Court ultimately rejected the proposed geographic limitation on the scope of the Act, due to its conclusion that,

> there is no evidence demonstrating that peace on the frontier and enforcement of treaty obligations were the *sole* purposes of the various Acts.

Id. at 622 (emphasis in original).

The important point for consideration here is that the *Mohegan* decision does not in any way contest the longstanding view that the Nonintercourse Act was enacted for the protection of Indians. It limited itself to discussing "the State's argument . . . on the motivation for granting federal protection for Indians," *id.*, at 621, and found that a governmental concern for peace on the frontier was a factor in the determination to protect Indians.

There is no inconsistency in finding that a statute was enacted for the benefit of a special class, and that it serves a broader public interest as well. In *Merrill Lynch, supra*, for example, the Supreme Court found that the Commodities Exchange Act, 7 U.S.C. § 4b, was enacted for the especial benefit of investors in futures contracts, and could be invoked by such persons in private actions for damages. In so holding, the Court explained:

> The legislative history quite clearly indicates that Congress intended to protect all futures traders from price manipulation and other fraudulent conduct violative of the statute. It is assumed, of course, that federal regulation of futures trading benefits the entire economy; a sound futures market tends to reduce retail prices of the underlying commodities . . . Although the speculator has never

> been the favorite of Congress, Congress recognized his crucial role in an effective and orderly futures market and intended him to be protected as much as the hedger.

Id., 456 U.S. at 390, 102 S. Ct. at 1845. The Nonintercourse Act was similar in conception, and the ability of the defendants to identify a governmental policy of promoting peace on the frontier does not negate the longstanding consensus that the instrument of that policy was a statute for the benefit of Indians in particular.

The defendants also argue that the original policy of the federal government was not to protect Indian possessory rights, but was rather to promote Indian withdrawal and the advancement of white settlement. In this view, the function of the Nonintercourse Act was to afford federal control over dispossession, in order that "this process should be as free of disorder and injustice as possible." F. Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790-1832* 186 (1962). The defendants thus regard it as historically inaccurate to characterize the Nonintercourse Act as a measure for the special protection of Indians, and they insist that a private right of action would disserve the Act's true function.

The defendants' thesis may well be accurate as history, *see, e.g., Mohegan, supra* at 622 (". . . the evidence rather convincingly demonstrates that the nation's early leaders were perhaps not so charitable toward the Indian as we have come to view them"), but it must not be a basis for discerning law. Whether or not the federal government anticipated or even desired the alienation of Indian lands, it nevertheless

committed itself to a system of treaties, agreements, and statutes which gave rise to a trust relationship between the government and the tribes. *See, Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 8 L. Ed. 25 (1831); *United States v. Kagama*, 118 U.S. 375, 6 S. Ct. 1109, 30 L. Ed. 228 (1886). The United States has thereby "charged itself with moral obligations of the highest responsibility and trust" with respect to its management of Indian affairs. *Seminole Nation v. United States*, 316 U.S. 286, 296-97, 62 S. Ct. 1049, 1054, 86 L. Ed. 1480 (1942). The Nonintercourse Act in particular is firmly understood to have "impose[d] upon the federal government a fiduciary role with respect to protection of the lands of a tribe covered by the Act . . ." *Passamaquoddy, supra*, 528 F.2d at 379. *See also, United States v. Oneida Nation of New York*, 201 Ct. Cl. 546, 477 F.2d 939 (1973); *Seneca Indians v. United States*, 173 Ct. Cl. 917, 923 (1963); *United States v. Sante Fe R. Co.*, 314 U.S. 339, 348, 62 S. Ct. 248, 252, 86 L. Ed. 260 (1941).

In effect, the defendants are asking the Court to look beyond the face of unequivocal legal commitments made to Indian tribes, and give effect to ulterior policy considerations which may have induced, in part, those commitments. The Court is loathe to take that path. No matter how thoroughly a *de facto* policy of Indian removal may be established, the *de jure* policy of this government from its very beginning has been to respect and protect Indian possessory rights. *Cramer v. United States, supra*, 261 U.S. at 227, 43 S. Ct. at 344; *see, Worcester v. Georgia, supra.* It is that *de jure* policy which the Court must consider in determining the issues raised by this lawsuit.

In a related argument, defendants maintain that the Nonintercourse Act was enacted in an era when Indian tribes generally lacked capacity to bring suit in federal court; that Congress therefore could not have intended that Act to bestow upon tribes a private right of action.

The historical accuracy of defendant's premise is debatable. Certainly during the nation's early history lawsuits by tribes were rare, but as scholars of the subject have explained:

> Except for the Cherokee, who had experienced some intermarriage and infusion of Anglo-American legal concepts, the tribes were ignorant of American legal processes and were still politically organized in traditional fashions, making resort to American courts virtually impossible.

Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 *Me. L. Rev.* 17, 46 (1978). It is also likely that the Supreme Court's decision in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 8 L. Ed. 25 (1831), which held that the Cherokee tribe was not a foreign state for the purpose of invoking the original jurisdiction of the Supreme Court, "had a chilling effect that discouraged tribes from bringing suit." Clinton & Hotopp, *supra* at 46. The Court did not, however, unequivocally declare a general tribal incapacity to sue. It is simply not clear, then, whether the scarcity of tribal suits in the 18th and early 19th centuries should be attributed to legal barriers, or rather to restraints that were political and cultural in nature.

In either case, the present right of the Cayugas to invoke the Nonintercourse Act does not turn on whether their ancestors had or lacked access to the

federal courts. The crucial aspect of our inquiry under *Rigsby* is firmly established: the Act was enacted for the especial benefit of Indians. Whatever impediments may have prevented plaintiffs' ancestors from bringing suit were extraneous to the purpose of the Nonintercourse Act, and have long since disappeared. Indians are now "entitled 'to take their place as independent qualified members of the modern body politic'", and their "participation in litigation crucial to their welfare should not be discouraged." *Arizona v. California*, 460 U.S. 605, ——, 103 S. Ct. 1382, 1389, 75 L. Ed. 2d 318 (1983), *quoting Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 369, 88 S. Ct. 982, 984, 19 L. Ed. 2d 1238 (1968), *in turn quoting Bd. of Cty. Comm'rs. v. Seber*, 318 U.S. 705, 715, 63 S. Ct. 920, 925, 87 L. Ed. 1094 (1943). More pointedly, there is no longer any doubt as to a tribe's capacity to sue in federal court. 28 U.S.C. § 1362. Defendants fail to suggest any persuasive reason as to why anachronistic notions of tribal capacity should now restrain the Cayugas from invoking a statute enacted for their benefit.

Moreover, it is a cardinal rule of construction that a statute framed in general terms embraces conditions arising in the future not known at the time of enactment. *Delima v. Bidwell*, 182 U.S. 1, 197, 21 S. Ct. 743, 753, 45 L. Ed. 1041 (1900); *United States v. Browder*, 113 F.2d 97, 99 (2d Cir. 1940). Without this principle, there would be continual doubt as to the right of married women, blacks, Indians, and others to invoke statutes enacted in periods when their predecessors had lacked capacity to sue. The principle is not in derogation of legislative intent, but rather extrapolates legislative intent to post-enactment circumstances. *See*, R. Dickerson, *The Interpretation and Application of*

Statutes, 127-29 (1975). By extension, then, a statute enacted for the benefit of Indians contemplates a tribal right of action once extraneous barriers to that right of action have ceased to exist.

For the reasons set forth above, the Court finds that the Cayugas' right to maintain this possessory action is derived from federal common law, from the right of the United States to maintain the action as trustee, and from the Nonintercourse Act itself, under the *Rigsby* analysis.

XII. ABATEMENT

Finally, the defendants contend that plaintiffs' right to sue under the 1793 and 1802 Nonintercourse Acts has "abated" due to the repeal of those statutes. The common law doctrine upon which they rely was stated by Chief Justice Marshall in *The General Pinkney*, 9 U.S. (5 Cranch) 281, 283, 3 L. Ed. 101 (1809):

> [I]t has been long settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted for violations of the law committed while it was in force, unless some special provision be made for the purpose by statute.

Chief Justice Taney later stated the rule with even greater brevity: "The repeal of a law imposing a penalty is itself a remission." *Maryland v. The Baltimore & Ohio R.R. Co.*, 44 U.S. (3 How.) 534, 552, 11 L. Ed. 714 (1845).

Accepting defendants' premise that the 1793 and 1802 Nonintercourse Acts have either expired or have

been repealed,[15] the defense of abatement is nonetheless inapplicable for several reasons. First, the defense

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[15] The Trade and Intercourse Acts of 1790, 1793, 1796, and 1799 were all acts of limited duration; the first three were made operative "for the term of two years, and from thence to the end of the next session of Congress, and no longer", *Act of 1790* § 7; *Act of 1793* § 15; *Act of 1796* § 22. The last was made operative for three years. *Act of 1799* § 21.

The 1793 Act was expressly repealed by section 21 of the 1796 Act. It is arguable, however, that a right of action under the 1793 Act was preserved by a limited savings clause in section 21 which provided that:

> all disabilities, that have taken place, shall continue and remain; all penalties and forfeitures, that have been incurred, may be recovered; and all prosecutions and suits, that may have been commenced, may be prosecuted to final judgment, under the said act or acts, in the same manner, as if the said act or acts were continued, and in full force and virtue.

Whatever effect this savings clause had, it terminated when the savings clause itself expired in 1802. The Trade and Intercourse Act of that year, which was the first such Act of unlimited duration, contained no such savings provision.

Thus defendants are correct in their statement that the Nonintercourse Act of 1793, which was in effect at the time of the challenged land transaction of 1795, has expired or has been repealed, and has not been preserved continuously by any savings clause.

The Act of 1802 was in effect at the time of the second challenged land transaction in 1807, and remained in effect until superceded by the Next Trade and Intercourse Act of 1834. The new Act expressly continued the effectiveness of the prior Act with respect to Indian tribes residing east of the Mississippi. *Act of 1834* § 29.

The 1834 Act continued in effect until Congress enacted the Revised Statutes in 1874. Defendants contend that a possessory action based on the pre-1874 Nonintercourse Act was made unavailable by the general repealer in the Revised Statutes, § 5596, and was not preserved by the general savings clause in the

is dependant upon a characterization of plaintiffs' claim as a private action to enforce the Nonintercourse Act. As discussed previously, however, plaintiffs' claim is also properly characterized as an action in ejectment asserting possessory rights confirmed by federal treaty. So viewed, the repeal of any particular Nonintercourse statute would not disable plaintiffs from asserting their claim.

But even if the action were deemed one arising under the Nonintercourse Act, the Court cannot accept the view that the pertinent clause in the Nonintercourse Act which plaintiffs seek to enforce imposes a "penalty" or "punishment" which would be subject to abatement. The relevant clause declares that certain transactions in land are of no validity in law or equity. The purpose of this restraint against alienation, as discussed at length above, was to protect Indian possessory rights. Under the rule of *Trop v. Dulles*, 356 U.S. 86, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958), such provision is not penal:

> This Court has been called upon to decide whether or not various statutes were penal ever since 1798. *Calder v. Bull* [3 U.S.], 3 Dall. 386, 1 L. Ed. 648 . . . In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purpose of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it

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Revised Statutes, found in § 13 (now at 1 U.S.C. § 109). Because the Court has determined, for reasons set forth, *infra*, that this possessory action has not been abated irrespective of whether the Nonintercourse Statute of 1834 survived the enactment of the Revised Statutes of 1874, it is not necessary to address the intricate question of what rights were terminated by the repealer and what rights were preserved by the savings clause.

> has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.

Id. at 95-96, 78 S. Ct. at 595.

It is clear that every Nonintercourse Act since 1793 has contained some penal provision within it which, arguably, is subject to abatement. For example, it may well be that the provision in the 1793 statute which imposed upon violators a "fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months" became unenforceable once that statute was repealed (or at least once the savings clause expired). This application would appear consistent with Chief Justice Marshall and Chief Justice Taney's statement of the rule. Indeed, the cases cited by the defendants in which the abatement doctrine was employed involved precisely such type of penal provisions. *See, e.g., United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 2 L. Ed. 49 (1801) (vessel condemnation); *The General Pinkney, supra*, 9 U.S. (5 Cranch) 281, 3 L. Ed. 101 (vessel condemnation); *Norris v. Crocker*, 54 U.S. (13 How.) 429, 14 L. Ed. 210 (1851) ($500 penalty); *United States v. Tynan*, 78 U.S. (11 Wall.) 88, 20 L. Ed. 153 (1870) (fine or imprisonment); *United States v. Chambers*, 291 U.S. 217, 54 S. Ct. 434, 78 L. Ed. 763 (1934) (fine or imprisonment); *Hamm v. City of Rock Hill*, 379 U.S. 306, 85 S. Ct. 384, 13 L. Ed. 2d 300 (1964) (fine or imprisonment).[16]

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[16] One remaining case cited by the defendants does involve a non-penal remedy, but does not involve abatement. In *Gulf, Colorado & Santa Fe Ry. Co. v. Dennis*, 224 U.S. 503, 32 S. Ct. 542, 56 L. Ed. 860 (1911) the question was whether an award of attorneys

The clause in the Nonintercourse Act which invalidates certain conveyances is wholly unlike the penal provisions held abated in the cases above. Though enforcement could work great hardship upon those who claim title through a transaction which is invalid under the Act, it is nevertheless manifest that the statutory disability was established not to punish, but to accomplish "some other legitimate governmental purpose." *Trop v. Dulles, supra,* 356 U.S. at 96, 78 S. Ct. at 595. Thus, plaintiffs' claim based upon the statutory disability did not abate upon the repeal of the specific version that was in effect at the time of the challenged transaction.

Moreover, the rationale of the abatement doctrine counsels against its application here. The cases in which the doctrine has been invoked typically involve situations wherein conduct that was punishable when committed became legal at some point before final judgment in the case had been rendered. For example, in *United States v. Chambers, supra,* defendant's conviction for conspiracy to violate the National Prohibition Act was vacated because, while his appeal was pending, the 21st Amendment was adopted, repealing Prohibition. Similarly, in *Hamm v. City of Rock Hill,*

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fees to a prevailing plaintiff under a state statute should be affirmed even though, while the appeal was pending, the state court declared the attorneys fees statute unconstitutional. In the course of holding that the intervening declaration of invalidity must be recognized on appeal, the Court referred to the abatement doctrine by analogy. It extrapolated from the abatement cases a general principle that a court on appeal must "recognize the changed situation, and either apply the intervening law or decision, or set aside the judgment and remand." Thus, *Dennis* hardly stands for the proposition that a right of action exists only so long as the original statute creating the right exists.

supra, the Court dismissed trespassing charges against civil rights "sit-in" participants because, though such conduct was illegal when committed, the intervening enactment of the Civil Rights Act of 1964 legalized the conduct and abated further prosecutions. *See also*, *United States v. The Schooner Peggy, supra* (vacating the condemnation of a vessel which was hostile when seized, because a United States-French treaty ended hostilities before the condemnation became final); *The General Pinkney, supra* (vacating the condemnation of a vessel which had illegally traded at St. Domingo, because during appeal such trade became legal).

The circumstances here stand in stark contrast to those in the abovementioned cases. The very first Nonintercourse Act provided that conveyances of land, absent federal consent, were invalid. That provision has been continually re-enacted in substance, and "has remained the policy of the United States to this day." *Oneida v. County of Oneida, supra*, 414 U.S. at 668, 94 S. Ct. at 777. *See*, 25 U.S.C. § 177. Where, as here, identical or substantially similar statutory provisions have continually been in force, the subsequent legislation is to be construed as a continuation of the previous legislation, despite formal repeal. *Bear Lake Irrigation Co. v. Garland*, 164 U.S. 1, 11-12, 17 S. Ct. 7, 9, 41 L. Ed. 327 (1876); *Steamship v. Joliffe*, 69 U.S. (2 Wall.) 450, 456, 17 L. Ed. 805 (1864).

Defendants argue that *Norris v. Crocker, supra*, holds otherwise and is controlling. In *Norris*, the owner of a fugitive slave brought an action to recover a statutory penalty against a person who allegedly violated the Fugitive Slave Act of 1793. While the action was pending, Congress replaced the 1793 Act with the Fugitive Slave Act of 1850. Although the Acts

shared a common purpose, to penalize those who assist fugitive slaves, the Court held that the claim arising under the earlier statute had abated, and was no longer enforceable.

Norris is reconcilable with *Bear Lake, supra.* In *Norris*, Justice Catron emphasized that the relevant provision in the new Act was "new and inconsistent with the 4th section of the act of 1793" with respect to the nature of remedies available to slaveowners. 54 U.S. (14 How.) at 472. Since the specific remedy that the plaintiff sought was no longer available under the new Act, the Court found it proper to dismiss the action. In short, the two statutes in *Norris* did not exhibit the continuity which enables an action to avoid abatement under the rule of *Bear Lake* and *Joliffe.*

Quite clearly, that requisite continuity of statutory policy is present in the case at bar. Plaintiffs' first claim arose under the 1793 Act, which provided in pertinent part:

> That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the Constitution.

The 1796, 1799, and 1802 versions of the Act exhibit only the minor change underscored below:

> That no purchase, *grant, lease, or other conveyance* of lands, or of any title or claim thereto, from any Indian, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be

made by treaty or convention entered into pursuant to the Constitution.

The 1834 version applies only to "any Indian nation or tribe of Indians", but is otherwise identical to its predecessor, as is the current version, 25 U.S.C. § 177.

In view of the nonpenal nature of the nonalienability clause in the 1793 and 1802 Acts, and in view of the continuous effectiveness of the statutory protection of Indian lands, the Court finds that plaintiffs cause of action has not abated.

XIII. CONCLUSION

Tribal land claim litigation attracts considerable attention and apprehension among non-Indians, and not merely among those in the claim areas. This is understandable given the size and location of the claimed lands and the drastic nature of the remedy sought. Indeed, the prospect of the most drastic conceivable remedies is extremely disturbing, and has tended to pervade and disrupt the impartial determination of the issues raised on this motion to dismiss. That it must not do. It is the duty of the Court, at this juncture, to ascertain whether it has jurisdiction over the subject-matter and the parties, whether the claim is justiciable and timely, and whether the complaint states a violation of Indian possessory rights. Those questions we must answer affirmatively. The Cayugas are therefore entitled to present evidence in support of their claim.

Defendants' motions under Rules 12(b)(1), (2), and (6) are denied. It is so ordered.

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

[Filed: Sept. 8, 2005]

Roseann B. MacKechnie
CLERK

Date:	9/8/05
Docket Number:	02-6111-cv
Short Title:	Cayuga Indian Nation v. Pataki
DC Docket Number:	80-cv-930
DC:	NDNY (SYRACUSE)
DC Judge:	Honorable Neal McCurn

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 8th day of September two thousand five.

CAYUGA INDIAN NATION OF NEW YORK,
PLAINTIFF-APPELLEE-CROSS-APPELLANT,

SENECA-CAYUGA TRIBE OF OKLAHOMA,
PLAINTIFF-INTERVENOR-APPELLEE-CROSS-APPELLANT

UNITED STATES OF AMERICA,
PLAINTIFF-INTERVENOR-APPELLEE

v.

GEORGE PATAKI, AS GOVERNOR OF THE STATE OF NEW YORK, ET AL., CAYUGA COUNTY AND SENECA COUNTY, MILLER BREWING COMPANY, ET AL.,
DEFENDANTS-APPELLANTS-CROSS-APPELLEES

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants Cayuga Indian Nation of New York and Seneca-Cayuga Tribe of Oklahoma. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: ARTHUR HELLER
ARTHUR HELLER
Motion Staff Attorney

APPENDIX M

UNITED STATES COURT OF APPEALS
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[Filed: Sept. 8, 2005]

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DEFENDANTS-APPELLANTS-CROSS-APPELLEES

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee United States. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: ARTHUR HELLER
ARTHUR HELLER
Motion Staff Attorney

APPENDIX N

STATUTORY PROVISIONS

1. Since 1790, see ch. 33, § 4, 1 Stat. 138, various forms of the Trade and Intercourse Act, also known as the Nonintercourse Act, have made the approval of the federal government a prerequisite to the lawful sale of land belonging to any Indian Tribe. The Trade and Intercourse Act in its current form provides as follows:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

25 U.S.C. 177.

2. Section 2415 of Title 28, United States Code, provides in pertinent part as follows:

> (a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: *Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment: *Provided further*, That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued: *Provided further*, That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed sixty days after the date of publication of the list required by section 4(c) of the Indian Claims Limitation Act of 1982: *Provided*, That, for those claims that are on either of the two lists published pursuant to the Indian Claims

Limitation Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim or (2) three years after the date the Secretary of the Interior has submitted legislation or legislative report to Congress to resolve such claim or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *Provided*, That an action to recover damages resulting from a trespass on lands of the United States; an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an

individual Indian whose land is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with subsection (g) may be brought on or before sixty days after the date of the publication of the list required by section 4(c) of the Indian Claims Limitation Act of 1982: *Provided*, That, for those claims that are on either of the two lists published pursuant to the Indian Claims Limitation Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim or (2) three years after the Secretary of the Interior has submitted legislation or legislative report to Congress to resolve such claim.

* * * * *

28 U.S.C. 2415.

3. Section 5(b) of Public Law No. 97-394 provides that, under specified circumstances, the Secretary of the Interior shall provide a report concerning tribal land claims that the Secretary has "decide[d] to reject for litigation." 96 Stat. 1978. Section 5(c) of the same law then provides:

> The Secretary, as soon as possible after providing the report required by subsection (b) of this section, shall publish a notice in the Federal Register identifying the claims covered in such report. With respect to any claim covered by such report, any right of action shall be barred unless the complaint is filed within one year after the date of publication in the Federal Register.

96 Stat. 1978.

Nos. 05-978, 05-982

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

GEORGE E. PATAKI, Governor of the State of New York, *et al.*,

Respondents.

CAYUGA INDIAN NATION OF NEW YORK, *et al.*,

Petitioners,

v.

GEORGE PATAKI, as Governor of the State of New York, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the Second Circuit properly reversed a damages award in an Indian land claim action as barred by laches, acquiescence, and impossibility under this Court's decision in *City of Sherrill v. Oneida Indian Nation*, 125 S. Ct. 1478 (2005), where petitioners sought (1) a declaration that the tribes now own and have the exclusive right to possess over 64,000 acres in central New York sold to the State 200 years ago; (2) ejectment of the current occupants of the land; and (3) trespass damages for the loss of possession.

RULE 29.6 STATEMENT

The parent company of respondent Miller Brewing Company is SABMiller plc, which owns 100% of the stock of Miller Brewing Company.

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES v

COUNTER-STATEMENT OF THE CASE 1

Introduction 1

Historical Background 2

Proceedings Below 8

REASONS FOR DENYING THE PETITIONS 11

I. The Court of Appeals' Decision Properly Construed *Sherrill* And Does Not Conflict With Oneida *II* 13

A. The Court of Appeals properly applied *Sherrill* to dispose of this action. 13

B. The holding below does not conflict with *Oneida II* 18

Contents

Page

II. The Other Issues That Petitioners Raise Do Not Present An Important Federal Question Warranting Review By This Court. 19

A. The application of laches is not inconsistent with 28 U.S.C. § 2415 19

B. The application of laches to the United States does not conflict with this Court's decisions or present a question of substantial importance. 21

CONCLUSION 23

TABLE OF CITED AUTHORITIES

Page

Cases:

Alsop v. Riker,
155 U.S. 448 (1894) 20

Blatchford v. Native Village of Noatak,
501 U.S. 775 (1991) 9

Cayuga Indian Nation v. Carey,
89 F.R.D. 627 (N.D.N.Y. 1981) 8

Cayuga Indian Nation v. Pataki (Cayuga XII),
79 F. Supp. 2d 78 (N.D.N.Y. 1999) 9, 10

Cayuga Indian Nation v. Pataki (Cayuga VIII),
1999 U.S. Dist. LEXIS 5228 (N.D.N.Y. 1999) .. 10

Cayuga Indian Nation of New York v. Pataki (Cayuga XI),
79 F. Supp. 2d 66 (N.D.N.Y. 1999) 10, 15, 17

Cayuga Nation v. United States,
28 Ind. Cl. Comm. 237 (1972) 6, 7

Cayuga Nation v. United States,
36 Ind. Cl. Comm. 75 (1975) 6

City of Sherrill v. Oneida Indian Nation,
125 S.Ct. 1478 (2005) ..... *passim*

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Page

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Felix v. Patrick, 145 U.S. 317 (1892) 13

Gardner v. Panama R. Co., 342 U.S. 29 (1951) 21

Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51 (1984) 21

Heckman v. United States, 224 U.S. 413 (1912) 22

Holmberg v. Armbrecht, 327 U.S. 392 (1946) 20

Kountze v. Omaha Hotel Co., 107 U.S. 378 (1883) 16

McKnight v. Taylor, 42 U.S. 161 (1843) 20

Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977) 21

Cited Authorities

Page

Oneida Indian Nation v. County of Oneida (Oneida I), 414 U.S. 661 (1974) 4, 15

Oneida Indian Nation of New York v. County of Oneida, 214 F.R.D. 83 (N.D.N.Y. 2003) 17

Roberts v. Cooper, 60 U.S. 373 (1857) 16

United States v. Beebe, 127 U.S. 338 (1888) 22

United States v. Minnesota, 270 U.S. 181 (1926) 22

United States v. Mottaz, 476 U.S. 834 (1986) 16, 19

Yankton Sioux Tribe v. United States, 272 U.S. 351 (1926) 13

United States Constitution:

Eleventh Amendment 9, 22

Cited Authorities

Page

Federal Statutes and Treaties:

Indian Claims Commission Act,
ch. 959, § 2, 60 Stat. 1049 (1946) 20

Indian Trade and Intercourse Act
1 Stat. 137 ..... 4, 5
§ 4 4

Rev. Stat. § 2116 5

25 U.S.C.
§ 177 5
§ 640d-17(b) 20

28 U.S.C.
§ 2415 ..... 12, 19, 20
§ 2415(c) 19, 20

Treaty of November 11, 1794
(Treaty of Canandaigua)
7 Stat. 44 3
article II 3

Treaty of January 15, 1838
7 Stat. 550 6
article 2 6
article 11 6

Cited Authorities

Page

Federal Rules and Regulations:

Fed. R. App. P. 30 3

Fed. R. Civ. P. 23(b)(1)(B) 8

Court Rules:

Second Circuit Rule 32(d) 3

COUNTER-STATEMENT OF THE CASE

Introduction

In 1795 and 1807, the Cayuga Indian Nation entered into two treaties ceding to New York State their interest in 64,015 acres (100 square miles) of land around the northern part of Cayuga Lake in Cayuga and Seneca Counties. During the intervening 200 years, non-Indians have occupied this land almost entirely, and New York State and the counties have exercised jurisdiction and sovereignty there. Before this lawsuit, the Cayugas never sought title to or possession of the land. In addition, until it belatedly intervened in this matter, the United States, which knew of both treaties when they were signed, had long asserted that New York did not violate federal law when it entered into the treaties.

The long-settled status of the title to this land ceded by the Cayugas was abruptly thrown into question in 1980 when the Cayuga Indian Nation of New York (the "Nation") filed this lawsuit, claiming for the first time in nearly 200 years that it has a current exclusive right to possess the land and seeking to eject the thousands of current landowners. In 1981, the Seneca-Cayuga Tribe of Oklahoma (the "Tribe") joined in the Nation's challenge, as did the United States in 1992, both filing substantially similar complaints seeking to revive the Cayugas' ancient possessory rights and eject current landowners. *See* U.S. App. 350a.[1] The district court agreed with petitioners that the treaties violate federal law but refused to eject the current occupants, instead awarding

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1. We refer to the United States Appendix in docket no. 05-978 as "U.S. App. " and to the Tribal Petitioners' Appendix in docket no. 05-982 as "Tr. App. ".

nearly a quarter billion dollars in damages against New York State as compensation for the Cayugas' purported loss of possession, including prejudgment interest. In their cross-appeals, the Nation and the Tribe again sought to eject the current landowners and regain possession of the land.

The court of appeals reversed, holding that this Court's recent decision in *City of Sherrill v. Oneida Indian Nation*, 125 S. Ct. 1478 (2005) ("*Sherrill*"), bars these possessory claims. U.S. App. 1a-50a. The court of appeals correctly found that *Sherrill* negates any continuing tribal right to possess the disputed lands, and precludes any relief, including damages, based on that right. There is no dispute among the circuits on this point. Accordingly, the decision below does not merit this Court's review.

Historical Background

From 1795, when they relinquished nearly all the land at issue in this case, until 1980, when this action began, neither the Cayugas nor the United States ever sought to return the Cayugas to possession of this land. To the contrary, the Cayugas accepted payments in exchange for their lands, and the United States repeatedly stressed the validity of the transfers in which the Cayugas ceded their interest to the State.

The Cayugas fled their homeland after siding with the British during the American Revolution and facing a confederal and state military campaign against them. U.S. App. 192a, 196a-199a. In 1784, the Cayugas and the other tribes who had sided with the British made peace with the United States and New York State. U.S. App. 204a;